Nos. 57, 58, and 59

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK, APPELLANTS

v.

THE UNITED STATES OF AMERICA

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 2579) is reported in 52 F. Supp. 362.

JURISDICTION

The judgment of the district court was entered on January 13, 1944 (R. 2630–4). Petitions for appeal were filed in Nos. 57 and 58 on March 9, 1944, and were allowed on the same day (R. 2634–5, 2639–40, 2646, 2660–1). Petition for appeal in No. 59 was filed on March 13, 1944, and was allowed on the same day (R. 2665–6, 2672).

The jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. sec. 29, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. sec. 345. Probable jurisdiction was noted on May 8, 1944 (R. 2681).

QUESTIONS PRESENTED

1. Whether the by-laws of The Associated Press, which constitute an agreement among its members having the purpose and effect of excluding a newspaper which competes with a member newspaper from the news gathered by and interchanged through AP, are in illegal restraint or monopolization of interstate commerce, upon any or all of the following grounds—

(a) as an agreement by a preponderant part of the newspaper industry, effectuated by a combined refusal to deal, to exclude others, for competitive reasons, from trade and commerce in such news;

(b) as a combination by independent newspaper enterprises to act collectively both in gathering

news and in pooling news which they individually gather, but to deny to their nonmember competitors the advantage in trade which participation in such joint action confers;

(c) as imposing a restraint which is illegal under the Sherman Act because an interest of vital general concern—the dissemination by newspapers of news from as many different sources and with as many different facets as possible—is injured and this interest outweighs the proprietary interest of AP members protected by the restraint.

2. Whether the agreement for the exclusive interchange among AP members of the spontaneous news of the locality gathered by each of AP's 1235 regular members is in unlawful restraint or monopolization of interstate commerce, irrespective of any concomitant illegal restriction of membership in AP.

3. Whether the agreement by which AP excludes every nonmember United States newspaper and other United States news agency from news reports of The Canadian Press unlawfully restrains or monopolizes interstate or foreign commerce irrespective of any concomitant illegal restrictions on membership in AP.

4. Whether the provisions of the district court's judgment relating to the adoption by AP of new or amended by-laws respecting admission to membership give adequate relief.

5. Whether the relief granted in this case constitutes converting AP, by judicial fiat, into a public utility, or exceeds the limits of proper equitable relief.

6. Whether the relief granted will abridge in any respect the constitutional guaranty of freedom of the press.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. (15 U. S. C. sec. 1)
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *. (15 U. S. C. sec. 2)
>
> * * * * *
>
> SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and

> it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * (15 U. S. C. sec. 4)

STATEMENT

PRIOR PROCEEDINGS IN THE CASE

This is a civil suit by the United States charging The Associated Press and its members and directors with being parties to a conspiracy to restrain interstate commerce in news, information and intelligence and with monopolizing and conspiring to monopolize a part of such commerce, in violation of Sections 1 and 2 of the Sherman Act. The complaint named as defendants The Associated Press (referred to herein as AP), its 18 directors and 18 of its members. The remaining AP members were sued as a class of persons so numerous as to make it impracticable to bring them all before the court and having an interest in the subject matter of the action identical with that of the members named as defendants.[1]

After the defendants had answered the complaint, the Attorney General filed a certificate under the Expediting Act of February 11, 1903, 15 U. S. C. sec. 28, and a three-judge court consisting of Circuit Judges Learned Hand, Augus-

[1] See Rule 23 (a) of the Rules of Civil Procedure.

tus N. Hand, and Swan was designated to hear and determine the cause (R. 115, 131, 156, 157).

Both the Government and the defendants served upon the other certain requests for admissions and interrogatories, answers to which were duly filed.[2] Certain facts were stipulated and, upon notice of AP, the depositions of 13 witnesses were taken on oral examination (R. 794, 1977, 1980–2223).

In May 1943 the Government filed, pursuant to Rule 56 of the Rules of Civil Procedure, a motion for summary judgment giving as ground therefor that the pleadings, admissions, depositions, and stipulation of the parties already on file with the court, together with the affidavits filed in support of the motion, established that there was no genuine issue as to any material fact and that the plaintiff was entitled as a matter of law to the judgment for which it moved (R. 955, 957–8). After opposing affidavits had been filed by the defendants and certain counter-affidavits by the Government, the cause was submitted for decision on the motion for summary judgment.[3]

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[2] The Government served on the defendants two requests for admissions and served interrogatories addressed to AP, to the defendants Tribune Company and McCormick, and to the defendants Bulletin Company and McLean (R. 158, 347, 433, 487, 773). AP served upon the Government interrogatories and a request for admissions (R. 801, 886).

[3] For the Government's original affidavits and counter-affidavits, see R. 974–1298, 1962–76. For the defendants' affidavits, see R. 1299–1961.

In an opinion rendered on October 6, 1943, the district court held that facts which were undisputed or concerning which there was no substantial dispute were sufficient to dispose of all issues in the case without a trial (R. 2579, 2580). On the substantive issues presented the court held:

The provisions of the AP by-laws which restrict admission to membership in AP by reason of the applicant's competition with a member newspaper are illegal (R. 2588–98). As long as such membership restrictions remain in force, the by-law provisions prohibiting any regular member from furnishing to a nonmember the local news which it gathers and prohibiting AP from supplying its news reports to any nonmember are illegal (R. 2598–9). Likewise, as long as such membership restrictions continue, AP's contract with the Canadian Press is illegal in so far as it requires the Canadian Press to furnish its news reports, within the United States, exclusively to AP and its members (R. 2599). AP's reciprocal covenant to give its news reports to no one in Canada other than the Canadian Press and its members is, however, not within the reach of the Sherman Act (*ibid.*). AP and Wide World Photos, Inc., were not in substantial competition with each other prior to AP's acquisition of all of the latter's stock and this acquisition was not unlawful (*ibid.*).

The opinion set forth the general terms of the judgment to be entered. The terms thus stated

were: The present by-laws regulating the admission of members should be enjoined but the judgment should permit AP to adopt substitute by-laws restricting admission—

> provided that members in the same "field" as the applicant shall not have power to impose, or dispense with, any conditions upon his admission, and that the by-laws shall affirmatively declare that the effect of admission upon the ability of an applicant to compete with members in the same "field" shall not be taken into consideration in passing upon his application. (R. 2600.)

The other provisions of the by-laws found to be illegal and the Canadian Press contract should be enjoined, but AP, if it amends its by-laws governing the admission of members, should be granted leave to apply for relief against these prohibitions (R. 2600–1). These prohibitions should be stayed for 120 days after entry of judgment and the whole judgment should be stayed for 60 days after entry and during the pendency of any appeal taken within this time (R. 2601).

Judge Swan dissented upon the ground that no restraint or monopolization of trade of a kind prohibited by the Sherman Act had been shown (R. 2601–5).

After the court had filed findings of fact and conclusions of law (R. 2606–29) and had entered

a judgment in accordance with the views expressed in the opinion (R. 2630–5), all the parties appealed to this Court. The appeal (No. 57) by the defendants other than the Tribune Company and Robert Rutherford McCormick, and the appeal (No. 58) by the latter two defendants, assign error to the granting of any part of the Government's motion for summary judgment (R. 2634, 2639, 2646, 2660). The appeal by the Government (No. 59) principally attacks (1) the qualifications attached to the injunctive relief against adoption of new by-laws relating to admission of members and (2) the holding and judgment that the by-law requirement that regular members furnish their local news exclusively to AP and its members, and the agreement by Canadian Press to give AP and its members exclusive rights to Canadian Press news, are unlawful only when taken in connection with illegal restrictions on AP membership (R. 2666–9).*

NATURE AND EXTENT OF UNDISPUTED FACTS

The district court, as required in a proceeding on a motion for summary judgment, confined its consideration to facts which were undisputed (R. 2580). It made 151 findings of fact. Since only two of these findings have been assigned as

* The Government did not assign error to the dismissal of that part of the complaint praying that AP be required to divest itself of the stock of Wide World Photos, Inc.

error in any of the three appeals,[5] the remaining 149 findings must be taken to be undisputed.

The court's findings did not embrace, nor could they reasonably embrace, all of the facts as to which there was no dispute. Many additional facts stated in the Government's complaint were admitted by the defendants' answers[6] and other facts were admitted by their answers or the Government's answers to requests for admissions and to interrogatories. Still other facts are set forth in affidavits made on personal knowledge with reference to matters on which the affiant was competent to testify and, not having been challenged by counter-affidavit, are undisputed.[7] But an unchallenged affidavit statement of opinion or belief does not establish the ultimate fact on which opinion, belief or judgment is expressed. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627–628.

The Government will rely solely upon facts which are undisputed on the above basis.

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[5] Appellants in No. 58 have assigned error to finding 70 (R. 2649–50). The appellant in No. 59 has assigned error to finding 20 (R. 2669).

[6] Most of these admissions took the form of a failure to deny or to state lack of sufficient information to form a belief as to the truth of the averment. Averments of the complaint not controverted in either of these two ways were admitted. Rule 8 (b), (d), of Rules of Civil Procedure.

[7] See Rule 56 (e) of the Rules of Civil Procedure. *Board of Public Instruction* v. *Meredith*, 119 F. (2d) 712, 713 (C. C. A. 5), certiorari denied, 314 U. S. 656; *United States* v. *Freeman*, 37 F. Supp. 720, 722 (Mass.).

Since the AP by-laws are among the most important facts in the case, it should be noted that the original by-laws adopted in September 1900, the significant changes therein between September 1900 and the filing of suit in August 1942, and the by-laws in effect in August 1942, are undisputed (Fngs. 10–12, R. 2607).[8]

THE GENERAL CHARACTER AND ACTIVITIES OF AP

AP is a nonprofit corporation organized in 1900 under the Membership Corporation Law of the State of New York, with membership confined to those who are the sole owners of a newspaper.[9] It acts as the common instrumentality of its members for the constant exchange between them of news which the respective members furnish to AP, and it also supplies to its members news gathered by its own staff (Fng. 3, R. 2606). Since its governing rules permit it to furnish news only to members,[10] a newspaper denied membership in AP is denied opportunity to participate in the joint undertaking by which members interchange news and share in the cost of news collection. The AP by-laws as amended from

[8] The original by-laws, the changes up to August 1942, and the 1942 by-laws are set forth, respectively, in Exhibits C, D and E attached to the Government's complaint (R. 41, 59, 65). They are averred in paragraph 50 of the complaint, which the defendants did not deny (R. 11, 124, 140).

[9] Fng. 1, R. 2606; By-laws, Art. II, Sec. 1 (b), R. 66.

[10] By-laws, Art. VII, Sec. 4, R. 77.

time to time constitute a contract, necessarily identical, between AP and each of its members.[11] Every member of AP is required to furnish to it the local news of spontaneous origin gathered by the newspaper's staff.[12] The effect of this arrangement is to make every reporter of AP's 1247 United States member newspapers also a reporter for AP (Fng. 16, R. 2608).[13] AP also obtains domestic news from its 94 news bureaus maintained throughout the United States and from its string correspondents (Fng. 15, R. 2607). It obtains foreign news from its foreign bureaus, from foreign news agencies which supply AP with news reports under contract, and from its foreign string correspondents (Fng. 17, R. 2608).

The news gathered by AP is sent by telegraph, cable or telephone to news assembly points established in the main office in New York and in the division offices for AP's southern, central and western divisions. At these points the news is classified, largely edited and rewritten, and sent to members primarily by telegraph on wires leased and operated by AP. Trunk telegraph wires serve the principal cities of the United States and AP members in these cities, while

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[11] *Idem.*, Art. III, Sec. 5, R. 70.

[12] *Idem.*, Art. VIII, Secs. 3, 4, R. 79.

[13] The total number of such reporters is large. The 18 member newspapers specifically named defendants have an average of 42 full-time reporters and an average of 130 string (part-time) reporters. (Fng. 16, R. 2608.)

regional and State wire circuits carry the news to members in smaller cities. In addition to the wires carrying the main news report, parallel wires are leased to furnish supplementary news and material, such as news pictures, features, financial news, sport news.[14]

The cost of news collection, exchange and distribution, and all other expenses of AP, are assessed against the members.[15] The entire levy is allocated fundamentally upon the basis of distributing costs in proportion to the population served by the members and then dividing each allotment equally among all the members in the same field of publication (morning, evening or Sunday) in a given city irrespective of their differing circulations (Fng. 14, R. 2607).[16] Assessments are payable weekly in advance and there are drastic penalties for delay in payment (By-laws, Art. IX, Sec. 2, R. 81).[17] Assessments may

[14] Fng. 18, R. 2608; Complaint par. 54 (R. 12–13), admitted (R. 124–5, 140).

[15] By-laws, Art. IX, Sec. 1, R. 80.

[16] The assessment is a composite of charges made for the different kinds of service received by the member. The different services furnished are separately assessed. Some 19 or 20 different classifications entered into the assessments paid by the Tribune Company (Chicago Tribune) in 1941 and 1942. (Answer to Pl. Interrogatories to Tribune Co., Exs. 1, 2, R. 498–498B).

[17] If any assessment is not paid at the end of two weeks after notice of default the news service must be discontinued, all membership rights are forfeited, and a sum equal to assessments for 104 weeks becomes immediately payable (*ibid.*).

also be levied to accumulate a surplus fund and AP actually has substantial assets in excess of liabilities."[18]

AP's affairs are managed by its board of directors except that the board has delegated to AP's general manager, subject to the board's supervision, full authority over AP's news service and personnel (R. 319). The board's powers are, in important respects, plenary. The board determines the basis for apportioning AP's expenses among the members and the assessments of members. If it finds that a member has violated "any" provision of the by-laws, it may fine such member, suspend his membership privileges or present him to the members for expulsion. Its action in these matters is "final and conclusive". It may in its "discretion" waive the heavy penalties accruing upon default in payment of assessments. The by-laws cannot be changed without the approval of two-thirds of all the directors. (By-laws, Art. V, Sec. 1; Art. IX, Secs. 1, 2; Art. X, Secs. 1, 5; Art. XV (R. 73, 80–2, 86).)

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[18] By-laws, Art. IX, Sec. 1, R. 80; Pl. Req. Adm. 24a, Ex. 1 (R. 180, 209), admitted (R. 320, 423–4).

The December 31, 1941 balance sheet shows net assets of about $2,440,000 with fixed assets (teletype and wirephoto equipment, furniture, fixtures) carried at the nominal figure of $1.00 (Ex. 1, R. 209). An affidavit of AP's general manager states that in his "opinion" the "replacement value" of these fixed assets is $3,471,000 (R. 1444).

Although in this case AP has stressed its co-operative character, its members do not have equal voting rights in the election of directors. While each regular member of AP has one vote, bonds which it has issued give one vote in the election of directors for each $25 of bonds held (up to a maximum of $1,000) if the member has waived the right to receive interest on his bonds.[19] A bondholding member may therefore have 41 votes as against the one vote of a non-bondholding member. AP's bonds are held solely because of the voting rights which they give—every holder of the bonds has waived his right to interest (Fng. 129, R. 2625).

By reason of the voting privileges of bondholders, the bondholder vote "completely controls" the selection of AP directors (Fng. 130, R. 2625). In every one of the years 1937–1942 the bondholder vote for each nominee for director has greatly exceeded the membership vote; as to 45 of the 70 nominees during this period the bondholder vote was ten times or more greater than the membership vote (Fngs. 131, 132; R. 2625).[20]

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[19] By-laws, Art. VII, Sec. 1, R. 77; *idem.*, Art. XII, Sec. 3, 84–5. The regular members who alone have voting rights constitute about 99% of the total membership (Fng. 4, R. 2606).

[20] In view of the bondholders' overwhelming power of control and AP's general practice to reelect directors on expiration of their terms, little significance can be attached to the fact found by the court (Fng. 127, R. 2625) that in only two

AP's bonds were originally issued to give a minority of the membership control in electing directors, and the bonds still vest control in a minority. The bonds were issued upon AP's organization to those who held stock in its predecessor, Associated Press (Illinois), in proportion to their holdings of such stock and went to the "more important" papers in the organization and to some smaller papers "in key positions," and the majority of members was given no right to subscribe for bonds.[21] In 1928 subscriptions were permitted to the extent of $50 for each $25 of weekly assessment with a minimum of $100 allowed every member.[22] Nevertheless at present the approximately 100 members who hold not less than $1,000 of bonds own more than half of all bonds outstanding.[23] The statement by AP (Br. 46) that the maximum voting power "can be obtained by contributing the modest sum of $1,000 to the capital of AP" implies that such capital

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instances since 1900 has the bondholder vote differed from the membership vote in the election of directors.

[21] Pl. Req. Adm. 29–c, 29–d, 33–r, Ex. 6 (R. 185, 191, 219–20), admitted (R. 324, 326, 425, 794).

[22] *Idem.*, 29–e, 29–f, Ex. 7 (R. 185–6, 221), admitted (R. 326, 330, 425).

[23] The bonds outstanding on December 31, 1941, totaled $242,700 (Ex. 1 (R. 209), admitted (R. 180, 320, 423–4)). In August 1942 $131,000 bonds were held by proprietors owning not less than $1,000 of bonds (R. 730–8). In many cases the same corporation was the owner of two or more member newspapers and held bonds up to $1,000 for each such newspaper (*ibid.*).

contribution and the resulting additional votes are open to any member, whereas in fact they are open only to members paying a weekly assessment of $500 or more, about 9% of the members (Booth affidavit (AP), R. 1458).

In general, a person once elected a director has remained in office until death, resignation, or refusal to accept renomination.[24] Out of more than 200 renominations of retiring directors, only five have failed of reelection and since 1900 only 26 men have served on the executive committee.[25] The 1902 directors served an average of 15½ years and those reelected in 1942 (other than the three representatives of small cities) an average of 14 years; the respective averages are 17 and 18 years if a father-son successorship is regarded as continuous.[26]

THE AGREEMENT BY AP AND ITS MEMBERS TO EXCLUDE COMPETITORS OF MEMBERS

AP's rules and practice have always given to the purchaser of a member newspaper the unqualified right to succeed to the membership of the former owner and have always conferred upon

[24] At least 38 of the 46 directors elected since 1900 and not still in office terminated their directorships in one of these ways, 12 by death in office, 15 by resignation, and at least 11 by declining renomination (Pl. Req. Adm. 28–c, 28–f, 28–g, 28–o, Ex. 5 (R. 182–4, 218–9), admitted (R. 323–4, 425)).

[25] Complaint par. 57 (R. 14), admitted (R. 125, 140); Pl. Req. Adm. 28–e (R. 182), admitted (R. 323, 425).

[26] Complaint par. 58 (R. 14–15), admitted (R. 125, 140).

all of its important members the power effectively to bar the granting of a new membership to any applicant whose newspaper was competitive with their own. The right to acquire membership by purchase is of importance in this case chiefly because of the light which it throws upon AP's concurrent policy of denying membership to competitors of its members, except with the consent of all members competitive with the applicant.

(1) MEMBERSHIP BY ACQUISITION OF A MEMBER NEWSPAPER

AP's by-laws, from 1900 to date, have provided that any person who becomes the owner of a member newspaper automatically succeeds to the membership of the prior owner upon filing proof of his ownership, signing the membership roll, and assenting to AP's by-laws.[27] Obviously the AP members have no power of selection or rejection respecting members who enter the AP fold by way of purchase of any existing member newspaper.

The statement in AP's answer to the Government's complaint that if AP members "were deprived of the right to choose their associates in the cooperative enterprise, the distinctive character of the organization will be destroyed and the assurance of an impartial and unbiased news report would no longer exist" (R. 119) is met by

[27] By-laws, Art. II, Secs. 3–4, R. 66–7. As to the provisions prior to 1942, see R. 42–3, 60.

the fact that, in memberships acquired by purchase, no power of choice of associates has ever existed. Not only may a paper completely change in character when it passes under new ownership,[28] but many important transfers of membership have involved, not a continuation of the member paper under new ownership, but its absorption by an existing paper radically different in character and policy.[29]

There is close connection between barring new memberships in a city and "field" where there are one or more existing memberships and the unqualified right to admittance of transferees of memberships. It is the closing of the doors to new members in the same city and field which gives to a membership a definite, realizable monopoly value. This has proved to be substantial. As much as $1,300,000 has been paid for a membership, and in the early 1920's transfers of memberships were made for considerations well into the hundreds of thousands (Fng. 123, 124; R.

[28] For an instance in which an AP member charged at an annual meeting of members that the purchaser of a member paper was antagonistic to AP and was conducting the paper in a manner inimical to the interests of AP, see excerpts from the 25th volume of AP's Annual Reports (R. 1167, 1169–71).

[29] See transfer of membership from Commercial Bulletin to N. Y. Daily News, from Globe & Commercial Advertiser to N. Y. Sun, from Home Talk (Brooklyn Eagle) to N. Y. Journal-American, from Chicago Repository (Chicago Eve. Post) to Chicago Herald-American (R. 717–8).

2624–5). Over $300,000 was spent in acquiring (and ultimately eliminating) a membership merely to prevent a competitor from obtaining it.[*] AP has condoned the practice of treating a membership as a separate and distinct vendable asset by permitting the purchaser of the membership of a discontinued paper to keep the membership

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[*] News Syndicate Co., Inc. (referred to herein as Syndicate) is owner of the N. Y. Daily News, a morning tabloid (R. 103; Fng. 75, R. 2616). It has had an AP membership since 1927 (R. 718). The N. Y. Daily Mirror, also a morning tabloid, did not acquire an AP membership until 1937 (Fng. 76, R. 2616).

In 1931 the owner of an evening paper thereafter published as the New York World-Telegram acquired from the owner of The World and The Evening World both a morning and an evening AP membership (R. 565, 718, 1103, 1179–80). It made an agreement with Syndicate, which was carried out, providing: A new corporation was to be formed to acquire the AP morning membership and to keep this membership alive by publishing a paper under the name The New York Repository; Syndicate would purchase half the stock of this corporation for $225,000 and would pay half the cost of publishing The New York Repository; during a two-year period either party might negotiate sale of the AP membership but it was expressly provided that no sale could be made to any New York "morning tabloid newspaper" (R. 1179–86). In 1933 Syndicate bought the remaining 50% of the stock of N. Y. Repository Corp. for $50,000 and terminated its AP membership (R. 1186–9).

The cost to Syndicate of keeping the AP membership out of the hands of its tabloid competitor was the foregoing $275,000, plus at least $26,152.78 representing its half of AP's weekly assessment of $645.76 paid during 81 weeks of token publication (R. 1180, 1188).

alive by publishing a mere "token" newspaper, in direct violation of explicit provisions of the AP by-laws.[21]

(2) BARRING COMPETITORS OF MEMBERS, 1900–1942

The restrictions upon admission of a new member competitive with an existing member or members had their origin in AP's predecessor, a corporation of the same name organized in 1892 under the law of Illinois, which functioned in the same manner as AP by acting as the common instrumentality of its newspaper members in interchanging among them the news which

[21] The by-laws provide that a membership shall terminate if the newspaper represented by membership "cease regular publication" (Art. II, Sec. 3, R. 66) and that the publication required to be made by every member shall be "that of a *bona fide* newspaper, continuously issued, * * * to a list of genuine paid subscribers" and that a publication "conducted for the purpose of preserving a membership, and not for public sale and distribution," shall not be a sufficient compliance with the by-laws (Art. XIII, Sec. 1, R. 85).

As to AP's sanction of token publication, see, in addition to preceding note, the following: After discontinuance of publication of the Philadelphia Evening Ledger in January 1942, defendant Bulletin Company, which for many years had had an AP evening membership in Philadelphia (Complaint, par. 25 (R. 5), admitted (R. 122, 133)), acquired the Ledger's membership. Bulletin Company thereupon published 200 copies of a four-page token newspaper which was circulated only in the sense that it was "available for purchase in the business office." AP nevertheless approved continuance of this membership. (R. 774, 775–7, 790–1, 1229, 1231.)

they gathered and in itself supplying them with news.[32] The members of the Illinois corporation were divided into A members and B members.[33] Each A member could veto the admission to membership of any newspaper published in the same city and "field" (morning or evening) as the A member's newspaper, and this veto right also included such territory contiguous to the city as was specified in the membership contract.[34]

A decision in 1900 by the Supreme Court of Illinois (*Inter-ocean Pub. Co.* v. *Associated Press*, 184 Ill. 438) was interpreted by the Illinois corporation's board of directors as holding that it was required "to admit to membership any newspaper applying" and that its rule "providing for an alliance, offensive and defensive, between member and association, *was void as in restraint of trade.*"[35] Thereupon AP was organized to acquire the assets and to carry on the activities of the Illinois corporation.[36] Each former A member was given a right of protest of the same scope as his former right of veto.[37] A commit-

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[32] Pl. Req. Adm. 33–b, Ex. 10 (R. 188, 234), admitted (R. 794, 797); R. 1418.

[33] *Idem.*, Ex. 10 (R. 242).

[34] *Idem.*, Ex. 10 (R. 242–3, 244).

[35] *Idem.*, 33–c, Ex. 11 (R. 188, 251, 252), admitted (R. 794, 797).

[36] *Idem.*, 33–f, 33–g, Exs. 13, 14 (R. 189, 254–5), admitted (R. 794).

[37] *Idem.*, 33–i, 33–q, Ex. 17 (R. 189, 191, 257, 258), admitted (R. 794). In over 100 instances the protest right covered territory within a radius of 60 miles from the city of publi-

tee of members of the Illinois corporation in a report to all its members in September 1900 said concerning this protest right:

> The committee received emphatic warning from counsel that this was the extreme limit to which an embodiment of the old veto power could be safely attempted in the new organization.[38]

From the time AP was organized in 1900 until April 1942 the requirements governing admission of new members were:

If there was no applicable protest right or if all holders thereof had waived their right of protest, the board of directors could elect a newspaper to membership.[39] Except where the directors could thus elect, the only way in which membership could be obtained was by the affirmative vote of not less than four-fifths of the AP members at an annual meeting of members or at a special meeting called for that purpose.[40] Since 1928 the right of protest has been extended to all AP members of five years' standing (R. 61–2). This right of protest applies to any membership sought on behalf of a newspaper published in the same city and field (morning or afternoon) as the member newspaper (*ibid.*).

The policy of AP and its members has been such that the requirement of a favorable four-

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cation and in one instance a radius of 150 miles (Complaint par. 85 (R. 26), admitted (R. 128, 146)).

[38] *Idem.*, Ex. 17 (R. 258).

[39] By-laws (1900–1942, Art. III, Sec. 2, R. 44, 61.)

[40] *Idem.*, Art. III, Sec. 1, R. 44, 60–1.

fifths vote by the members has been for all practical purposes an absolute barrier against admission. During the years 1900–1928, inclusive, of more than 100 applications for membership submitted to a vote of the members, all but six were rejected, and in each of these six cases the city involved was comparatively small, all but one of the holders of a right of protest had waived such right, the directors recommended election, and there was no member paper holding a right of protest in the same city (the territory covered by a right of protest being more extensive).[41] In addition, there were in each of the six cases special and unusual reasons for electing the applicant.[42]

The more than 100 applications submitted to a vote of the members during this 1900–1928 period involved 95 papers, of which, as stated, six were

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[41] Complaint par. 86, 3rd, 4th, 6th and 7th sentences (R. 26), admitted (R. 128, 146–7); Schilz affidavit (R. 1248–51).

[42] The six papers elected were the Santa Rosa (Calif.) Press Democrat, Palo Alto (Calif.) Daily Times, Warren (Ohio) Tribune, Trenton (N. J.) Times & Sunday Times Advertiser, San Jose (Calif.) News, and Redwood City (Calif.) Tribune (Pl. interrogatory to AP No. 58, R. 689, 698, 699, 700, 705).

In four of the six cases the one non-consenting holder of a protest right was a Hearst paper and the Hearst interests, as was pointed out to the members in the first of these applications, were conducting a rival news service and the protest right was thus being used, in effect, to promote this rival news service (Schilz affidavit, R. 1249–51).

In the two other cases there were, aside from the facts stated above, other exceptional circumstances. One application involved Warren, Ohio. A Cleveland paper with a circulation in Warren of about 3,000 did not object to the

elected.[42] Of the remaining 89, 57 (or 64%) have never obtained membership and 32 (or 36%) later did obtain membership, 25 by election by the directors after the barrier of protest rights had been removed by waiver or otherwise and seven by acquisition of or merger with a member paper (R. 689–707). In the seven cases of membership by merger or acquisition, the time lag between the first rejection and membership averaged about 22 years (Table A, Appendix, *infra*, p. 136). In the 25 cases of ultimate election by directors, the time lag between first rejection and membership averaged eight years (Table B, Appendix, *infra*, p. 136).

In the 13-year period, 1929–1941, only one application for membership subject to a protest right was submitted to a vote of the AP members

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election whereas the circulation in Warren of the one protesting Youngstown member was only about 150 and this member did not appear at the membership meeting although notified that the application would be voted upon. The other application was for a Trenton afternoon paper publishing a Sunday morning edition. Philadelphia papers, whose protest rights covered the state capitals of New Jersey and Delaware, had all waived except one morning Philadelphia paper and it had some years earlier granted a waiver to the same applicant, subject to the limitation that the membership be perfected within three months. (*Idem.*, R. 1250.)

[42] The defendants listed 97 papers (R. 689–707) but two (Niagara (N. Y.) Falls Gazette (R. 701) and the Long Beach (Calif.) Sun (R. 705) are reported as not having been voted upon by the members. That more than 100 applications voted upon by members involved only 95 papers is due to the fact that several papers submitted applications in two or more years (R. 691–3, 696, 699, 700, 702–4).

and it was rejected (R. 689, 707). Since this failure to press applications which required election by the members was certainly not due to any lack of desire for membership in AP,[*] the inference is compelling that the futility of pursuing this road to membership had come to be generally recognized.

It thus appears that of all applicants involving competition and requiring election by the AP members, 95% were *rejected*. In contrast, where there was no member paper in the same city and field or such member or members had waived right of protest and the directors therefore had authority to elect, 95% of the applicants were *elected*. The number of those respectively elected and rejected where the directors had authority to act is shown only for the years August 1932 to August 1942, inclusive. During this ten-year period the directors granted 338 applications for membership and rejected only 16 (Shiller affidavit (AP), R. 1463). Thus of 354 applications acted upon by the directors, they granted 338, or over 95%.

Even when no protest right was involved, the directors' uniform policy was not to elect if they believed that admission of the applicant would adversely affect the competitive interests of any member. Frank B. Noyes, the president of AP from its organization in 1900 to 1938 (R. 1415),

[*] During the same 1929–1941 period there were 419 admissions to membership in cases where election by vote of the members was not required (Pfeiffer affidavit filed by AP, R. 1908).

so stated at the annual membership meeting in 1922. He there said: "In no case has it [the board] elected or recommended election when it felt that real injury was done a present member." [45]

(3) BARRING COMPETITORS OF MEMBERS UNDER THE BY-LAWS AS AMENDED IN 1942

The by-laws relating to admission of members were amended at the annual membership meeting in April 1942. The board of directors in proposing such amendment adopted a resolution which, after reciting that AP had been advised that the Government regarded the existing by-laws as being in violation of the Sherman Act, stated that the directors had adopted the amendments in order to attempt to meet the objections raised by the Government (Complaint par. 92 (R. 28), admitted (R. 128, 149)).

As amended in 1942, the by-laws provide: The directors may elect an applicant "in a field in a city where there is no existing membership" and they may also elect if all members in the city and field of the applicant waive the right, given by the amended by-laws, to a money payment from the applicant (Art. III, Sec. 3, R. 69–70).[46] If there are one or more memberships

[45] Pl. Req. Adm. 34–a, Ex. 23 (R. 191, 268), admitted (R. 333, 427).

[46] The waiver is sufficient if the member or members entitled to receive payment waive payment "in whole or in part" (R. 70).

in the applicant's city and field and all such members have not waived their rights to a money payment from the applicant, election can be only by a majority vote of the members at an annual membership meeting or at a special meeting of members called for that purpose (Art. III, Sec. 1, R. 68). An applicant so elected shall not, however, be admitted to membership until—

(a) The applicant shall pay to AP, for distribution by it among the members competitive with the applicant, a sum equal to 10% of the total amount of the regular assessments received by AP since October 1, 1900, from its members in the applicant's field and city, or three times the current annual regular assessments of such members, whichever is greater; and

(b) The applicant shall relinquish any exclusive right that he may have to any news or news picture services and, when requested by any member in the same field and city, require such news or news picture services to be furnished to such member upon the same terms as they are made available to the applicant (Art. III, Sec. 2, R. 68–9).

These provisions are not only more restrictive in important respects than the earlier ones but, as the district court said (R. 2592), they "are plainly designed in the interest of preventing competition", i. e., to bar or discourage the actual admission of competitors of members. The sum

which an applicant must pay to his AP competitors as a condition to membership is onerous and substantial.[47] The amounts thus payable were not computed upon any proportionate value of AP's capital assets, and non-competing applicants are not required to make any payment for admission (Fngs. 119, 120, R. 2624).

In the words of the district court, the exaction is designed both to compensate the applicant's competitors for the loss of their "differential advantage" and "to act as a deterrent" (R. 2593). The added requirement that any exclusive service which the applicant has been receiving be made available upon the same terms to AP members is likely in itself to prove an insurmountable bar to admission. In the discussion of the proposed by-law amendments at the 1942 membership meeting, this effect of the requirement was recognized and met with approval (R.

[47] The amounts payable were as follows as of July 1, 1942, for the 11 largest cities of the United States (Fng. 117, R. 2623):

City	Morning	Evening
New York	$1,432,142.73	$1,095,003.21
Chicago	416,631.90	595,772.31
Philadelphia	391,173.12	427,918.20
Detroit	273,929.91	300,702.16
Los Angeles	493,206.24	156,652.37
Cleveland	200,721.33	204,561.66
Baltimore	209,199.75	268,268.83
St. Louis	233,932.29	271,802.49
Boston	336,759.45	310,025.82
Pittsburgh	191,703.24	185,195.79
Washington, D. C.	184,421.49	182,974.50

1229, 1234–5). Concerning the requirement the district court said (R. 2593):

> To require him to relinquish his own exclusive rights may perhaps be "reasonable," but certainly it is not so to require him to secure similar rights to others. That may prove a complete bar to the admission of any applicant who is already a member of a news service not automatically open to all comers.

In substance, the 1942 amendments substitute the right to a money payment for the right of protest. AP's president expressly so declared at the membership meeting (R. 1229, 1235–6). A member of the committee which had drafted the amendments stated that they had been drawn throughout upon the theory that "protest rights of members must be preserved" (R. 1236).

On the question of permitting election by a majority vote, a director said at the membership meeting that there were only two instances in the history of AP in which a majority vote was obtained and an 80% vote not obtained; that in one of these cases Mr. Hearst, the objecting AP member, had both AP and his own service and "that created a special condition"; that he thought that the required majority vote "is ample protection in ninety-nine out of a hundred cases, if not in all cases" (R. 1229, 1235, 1246).

An amendment to the by-laws adopted in February 1943 during pendency of the present suit

eliminated the alternative minimum payment of three times the current annual assessments paid by the members in the applicant's city and field; this change reduced somewhat the amount of the payment imposed as a condition to membership (Fng. 118, R. 2623–4).[48]

At the same meeting at which the by-laws were amended the membership applications of two newspaper owners were voted upon and rejected, the favorable vote in each case being far less than the majority required to elect. The history of these applications furnishes illuminating evidence as to the purposes and functioning of the AP by-laws where a newspaper seeks AP membership and service over the objection of any existing member newspaper with which it competes.

In September 1941 Marshall Field applied for membership for a morning paper which he was about to start in Chicago. He was advised that the owners of the Chicago Tribune and the Chicago Herald-American refused to waive their

[48] The amounts payable following this change, as set forth in finding 118, are as of June 30, 1942. (See Pl. Req. Adm. 38–a (R. 199), admitted (R. 342, 429).) Any person subsequently elected would have to pay the amount set forth plus 10% of the assessments paid after June 30, 1942, by AP members in his field and city. In the case of a Chicago morning paper, for example, the amount of $334,250 shown by finding 118 would be increased each year by about $13,887, which is 10% of the current annual assessments paid by Chicago morning papers (*idem.*, 38–c (R. 200), admitted (R. 343, 429)).

protest rights, that the board of directors could therefore not elect, and that the application would be referred to the next annual membership meeting in April 1942. (Complaint par. 102 (R. 32–3), admitted (R. 129–30, 152).)

In November 1941 Eleanor Medill Patterson, owner of the Washington Times-Herald, filed an application for a morning membership and an application for an evening membership for this paper.[49] The holder of a protest right in each field failed to waive and the applications were referred to the next annual meeting of members. (Complaint par. 107 (R. 34), admitted (R. 131, 152–3).)

In November 1941 Marshall Field offered to pay $250,000 in cash for the morning membership in Chicago held by the Hearst interests (R. 344–5, 1013). The offer was rejected (R. 1013). Field's paper, The Chicago Sun, began publication on December 4, 1941 (*ibid.*). At the suggestion of the president of AP, Field in March 1942 sent a form letter to AP members soliciting their proxies in support of his application for membership for The Chicago Sun.[50]

Defendant Tribune Company, owner of the Chicago Tribune, actively campaigned against

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[49] Applications for membership by a predecessor of this paper had been rejected by the members on three prior occasions, in 1914, 1917, and 1920 (R. 689, 696).

[50] Pl. Req. Adm. 39-j, 39-l, Exs. 35, 37 (R. 203, 296–7, 297–8), admitted (R. 345, 429).

membership for the Chicago Sun, and its employees or representatives personally visited in this connection at least 577 AP members (R. 511, 520–37). A letter requesting proxies and certain follow-up letters and a telegram were sent to all of the members interviewed who had indicated that they opposed membership for the Chicago Sun and that they would not be present at the annual meeting (R. 511–19). The Chicago Herald-American, although an afternoon paper (R. 1070–1, 1092), also solicited proxies against membership for the Sun (R. 1209–12). The letter of solicitation significantly said (R. 1211):

> You as a member of The Associated Press enjoy in your own community rights of protest. We believe that you consider such rights of great value. Were Mr. Field successful in his effort to override our protests, *the asset value of your membership would be immediately affected and your own property rights might be similarly imperiled at any time.*
>
> What we seek is to preserve the right and value which are inherent in all Associated Press memberships and in doing so we are protecting YOUR rights as well as our own. [Italics supplied.]

At the membership meeting the sports editor of the Chicago Tribune made an "impassioned 15-minute plea" against admission of the Sun and said that he represented the 3,500 Tribune

employees "whose job security would be threatened" if the Sun were admitted to membership.[31] A representative of a Washington morning member paper and a representative of a Washington afternoon member paper addressed the meeting in opposition to membership for the Washington Times-Herald.[32] Membership for the Chicago Sun was rejected by a vote of 684 to 287 and memberships for the Washington Times-Herald were rejected by a vote of 514 to 242 (Complaint par. 101 (R. 32), admitted (R. 129, 152)).

AP's statement (Br. 55) that "Many members [of AP] felt that the Department of Justice was being used to intimidate them into voting in favor of the Field application, and their vote was principally a vote against such coercion," is not established by the evidence. The only supporting evidence is an affidavit by one individual that this was *one* of three reasons why he voted against the application for the Chicago Sun and that he knew from comments on the floor of the annual meeting that other members were "influenced by the same considerations" (R. 1776–7).[33] Even

[31] Pl. Req. Adm. 40–h; 40–i (R. 204–5) admitted (R. 345, 430).

[32] *Idem.*, 40–e (R. 204), admitted (R. 345, 429).

[33] The other record references given for the statement are AP's answer to the complaint (R. 129–30) and the selfserving answer of Tribune Company and McCormick to one of the plaintiff's interrogatories (R. 538–9). Among other statements in the answer to this interrogatory are that the Chicago Sun "is one of the world's poorest excuses as a metropolitan

less warranted is the implied statement (AP Br. 55) that the membership applications of Eleanor Medill Patterson were rejected because they came to a vote under the "atmosphere" of the Field application.[54]

THE IMPORTANCE OF AP SERVICE TO A NEWSPAPER

It is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting any substantial part of the news of the world; aside from other difficulties, the cost is so great that no single newspaper could sustain it (Fng. 37, R. 2611). There are many news-gathering organizations of one sort or another in the United States but only AP, United Press Associations (referred to herein as UP), and International News Service (referred to herein as INS) are "comparable in size, scope of coverage and efficiency" (Fng. 36, R. 2610–1).[55]

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newspaper"; that it is not in AP's interest "to hand around memberships to rich men's sons as playthings"; that many members "objected that Field was not a newspaperman but only a rich young man trying to kick the entire industry around with his wealth, aided by income tax savings"; that "Field started his newspaper for the sake of a political faction and this should not be encouraged where it is inspired by an administration in power and where there is no apparent likelihood of permanency of publication"; that if AP can be compelled to accept Field as a member, "this will result in the dissolution" of AP (R. 538).

[54] The record reference for this is solely AP's answer to the complaint.

[55] UP and INS, unlike AP, are corporations organized for profit and furnish service under contracts in which the charge

At present access to the news reports of one or more of these three news agencies is "essential to the successful conduct of any substantial newspaper serving the general reading public" (Fng. 38, R. 2611). Of the three, "AP ranks in the forefront in public reputation and esteem" (Fng. 69, R. 2616). It is the largest organization of its kind and "the chief single source of news for the American press" (Fng. 66, R. 2615).

There are differences between the respective news reports of AP, UP and INS since their facilities and opportunities for collecting news and transmitting it speedily differ, and individual judgment enters into the selection of events for news coverage and the preparation and editing of accounts of the same event (Fng. 67, R. 2615). Most of the larger newspapers, as well as many smaller ones, find it desirable to, and do, obtain the news reports of two or even three of these news agencies (Fng. 68, R. 2615–6).

At the present time no American newspaper of substantial circulation relies solely on INS news reports, that is, receives its reports without also receiving those of AP or UP or both.[56] It is

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is fixed at the rates agreed to by the parties (Fngs. 36, 56, R. 2611, 2614).

[56] Fngs. 103, 104; R. 2621. Each of the four morning papers taking solely INS news reports has a circulation of less than 2,000 (R. 1072, 1149). No afternoon paper with a circulation of over 20,000 takes INS reports alone (R. 1072–3, 1154–7).

therefore sufficient, in considering the restraint imposed by the agreement of AP members to exclude competitors of the present members from that service, to make comparison with the service most nearly comparable, that of UP.

In the domestic field AP exceeds UP in—

(a) Number of newspaper subscribers,

(b) Expenditures for collecting and transmitting news reports,

(c) Physical facilities utilized,

(d) Size of staff,

(e) Number and distribution of news bureaus,

(f) Number and distribution of newspapers supplying it with news of their localities (Fng. 84, R. 2618)."[57]

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[57] A printed brochure issued by Press Association, Inc., of which 1500 copies were distributed in May 1941 (R. 722), makes the following statements: An "impartial survey" of news coverage for the past year showed that "AP was ahead on 82 percent of *all* important news events"; AP surpasses "all other American news agencies combined" in, among other respects, the number of words in its daily news report, the number of miles in this country of "leased news wires", operation of the only "state-by-state news circuits" in existence, the volume of "state and regional news" furnished daily, the number of cities in this country connected with "leased news wires," and operation of "the only leased news cable in the world" (Pl. Req. Adm. 32-b, Ex. 9 (R. 187, 223, 225–6), admitted (R. 331, 426)).

Press Association, Inc., is a wholly-owned subsidiary of AP engaged in selling to radio stations bulletin news furnished to it by AP (Fng. 24, R. 2609). Its board of directors in 1941 consisted of the members of AP's executive committee and AP's general manager (Pl. Req. Adm. 31-i (R. 187), admitted (R. 330, 426)).

Still more enlightening is the pragmatic test of the choice of news agencies made by newspaper owners. Notwithstanding the barriers to obtaining AP service and the absence of similar barriers to UP service,[58] the papers receiving AP reports constitute a much greater percentage of all daily American newspapers, and have a much greater percentage of total circulation, than those taking UP reports. The relative standing of the two news agencies is (Fng. 85, R. 2618):

	% of Total Number		% of Total Circulation	
	AP	*UP*	*AP*	*UP*
Morning Newspapers	81	40	96	64
Afternoon Newspapers	59	45	77	35

The following table showing the comparison on the basis of the larger daily morning newspapers is even more striking (Fng. 89, R. 2619):

	Total Number	Number Receiving AP	Number Receiving UP	% of Total Number	
				AP	UP
Circulation over 50,000	64	[1] 63	39	98	61
Circulation 25,000 to 50,000	46	[2] 44	23	96	50
Total over 25,000	110	107	62	97	56

[1] The one non-AP paper is The Chicago Sun (Fng. 102, R. 2621).

[2] The two non-AP papers are the New York Daily Worker and the New York Morning Telegraph (R. 1066, 1075). The former is "published to serve the interests of a special group in the community" and the latter "makes its principal appeal to those interested in sports and other forms of commercial entertainment", so that neither "is, in the ordinary sense of the term, a 'general circulation' daily newspaper" (*Ibid.*).

[58] Any newspaper is free to subscribe to UP's news service. The only limitation is that where there is an outstanding UP "asset value" contract a new subscriber to its service must first make a money payment to the holder of the contract (*infra*, pp. 41–42).

Another significant test is the comparative use of the news reports of the two agencies made by newspapers receiving both reports. The following shows the result of a week's check by certain leading newspapers (the figures representing the number of columns of news material used):

	AP	UP
N. Y. Times (R. 2083–4)	111½	45½
Chicago Daily News (R. 1986)	60	29
N. Y. Herald-Tribune (R. 2041–2)	127	21

There have, of course, been instances in which AP members have surrendered their rights and taken UP service, and some newspapers in small, medium-sized and large cities have attained large circulations in proportion to the population served without having AP service and have competed successfully with AP member newspapers (Fngs. 71–73, R. 2616). The New York Daily News, a tabloid, achieved a circulation of about 1,200,000 without AP reports (Fng. 75, R. 2616). But when the News obtained an AP membership this made it "possible to put out a better paper", it carries a "much larger volume" of AP news than of UP news,[59] it uses AP wirephoto service and does not use that of Acme (UP), and the paper's present circulation is over 2,000,000 (R. 2209, 2212).

[59] A two-weeks check showed that the paper used more AP news than UP news in 10 of the 14 days (R. 2213–4).

EFFECT OF EXCLUSION FROM AP SERVICE WHERE THERE ARE BARRIERS TO OTHER NEWS OR NEWS PICTURE SERVICES

Denial of membership in AP bars a newspaper not only from AP news reports but also from its news picture service, which it furnishes exclusively to members (Complaint par. 73 (R. 20), admitted (R. 126, 144)). In recent years news pictures have become "a major competitive factor in the newspaper business" and AP has the only network of news photo wire transmission regularly maintained and transcontinental in character (*ibid.*; Fng. 21, R. 2609).

A newspaper which is denied AP's news picture service may also find itself barred from the two other major news picture services. These are Acme News-Pictures, Inc., and International News Pictures (R. 1190–1). Since the latter does not sell its service to any other newspaper in a city where there is a Hearst newspaper,[60] its service is not available in seven of the 11 largest cities of the country (R. 2127-8, 2129, 2170). It was not available to the Chicago Sun for this reason (R. 1014).

The Sun was also unable to obtain Acme pictures because of an exclusive contract which Acme had made with defendant Tribune Company (R. 501–4, 1014). On June 30, 1942, some seven

[60] The corporation of which International News Pictures is a department and the 17 Hearst newspapers are wholly owned subsidiaries of the same parent company (R. 2142-4).

months after the Sun began publication, the defendant Tribune Company gave a waiver permitting service to the Sun (R. 505–6). Its reason for doing so is interesting. It relinquished its exclusive rights to Acme service in the hope that this action would forestall proceedings by the Government against AP which, the Tribune Company has averred, threatened its "valuable interest" as a member of AP (R. 507–8).

The Chicago Sun, because denied access to the three major news picture services, was compelled to set up at heavy expense its own wire photo service and to purchase pictures from minor agencies, but it was nevertheless unable to provide a news picture coverage at all equal to that of the Chicago Tribune (R. 1015, 1191–8).

The exclusory policy of AP, coupled with "asset value" contracts made by UP and INS with various newspapers, have created in a number of cities barriers to news service similar to those found to exist in Chicago with reference to news pictures. These contracts provide that if another newspaper competing with the holder of the contract wishes to obtain UP (or INS) service it must pay to the holder the amount stated as the "asset value" of the contract. (Fngs. 106, 108, R. 2621–2.)[61] UP is a party to 215 such contracts

[61] In the case of INS, the asset value of 29 of its contracts is between $20,000 and $50,000 and the asset value of 10 is over $50,000, the highest being $199,188.60 (Fng. 109, R. 2622). In the case of the 25 UP contracts for which data is given,

made with newspapers located in 144 cities and INS is a party to 64 contracts with newspapers in 62 cities (*ibid.*). In addition, INS has entered into 13 contracts with newspapers giving the subscribers exclusive rights to INS news reports in their respective territories (Fng. 110, R. 2622).

Where there is only one newspaper in a city or where all papers in a city are under common ownership, holding an AP membership and asset value contracts with both UP and INS entrenches the newspaper's local monopoly by putting serious obstacles in the way of new competition. A new paper, if it is to succeed, must have the news reports of AP, UP or INS (Fng. 38, R. 2611), but the present AP member can effectively exclude it from AP service and UP or INS service can be obtained only at the price of a burdensome payment to the established paper. This kind of monopoly situation is found in 26 cities and it exists as to either the morning or the afternoon field in 18 other cities. (Fng. 111, R. 2622.)

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the asset value of 15 is between $20,000 and $50,000 and the asset value of six is over $50,000, the highest being $90,387.50 (R. 1264, 1298). See also the statement as to UP asset value contracts in Williams affidavit (R. 1483) relating to newspapers included in Exhibit 14 attached to Lee affidavit (R. 1164–6).

Both the UP and the INS contracts provide that after the fifth year the stated asset value shall be increased by 10% of the amount which the holder has subsequently paid for UP (or INS) service (R. 1264, 1285–9, 2166–8).

The number of newspapers in this country, particularly in the largest cities, has been steadily declining for many years although newspaper circulation has at the same time materially increased.[62] Restraints upon the entrance of new competitors into the field must be viewed against the background of the steady narrowing of the channels for public information and discussion represented by the press (see Fngs. 33–35, R. 2610).

AP'S CONTRACT WITH THE CANADIAN PRESS

The Canadian Press is a nonprofit membership corporation composed of owners of Canadian newspapers; its by-laws substantially parallel those of AP.[63] Its members constitute over 90%

[62] An affidavit of Alfred McClung Lee (R. 1047–50) and the exhibits attached to this affidavit show the following: The total number of daily newspapers in this country fell from 2,042 in 1920 to 1,787 in 1942, a decline of 12%, while their total circulation rose from 27,790,656 in 1920 to 43,374,850 in 1942, an increase of 56% (Exs. 2, 4; R. 1051, 1052). In the 25 largest cities of the country the total number of daily newspapers was 153 in 1900, 125 in 1920, and 90 in 1942 (Ex. 7, R. 1056). Between 1920 and 1942 the total circulation of daily newspapers in these cities rose from about 14,433,000 in 1920 to about 21,356,000 in 1942 (*ibid.*). In these 25 cities the average number of dailies in 1900 was six, whereas in 1942 only two of the 25 had as many as six papers (R. 1050). In 1942 there was only one morning newspaper in 18 of the 25 cities (*ibid.*).

[63] See charter and by-laws of Canadian Press attached to McNeil affidavit filed by AP (R. 1859–97). An affidavit of AP's general manager states that Canadian Press is a "counterpart" in Canada of AP (R. 1435).

of the English language newspapers of Canada and have over 95% of the total circulation of such newspapers (Fngs. 135, 136, R. 2626). The by-laws require its members to furnish their local news to the Canadian Press and forbid them to furnish such news to any United States newspapers or news agency other than AP and its members.[84]

A contract between AP and the Canadian Press made in 1935 and still in effect provides that Canadian Press shall deliver to AP its news of Canada and the British Empire and shall not deliver such news to anyone else for use outside of Canadian Press territory.[85] AP on its part covenants to deliver its news report to Canadian Press and to no one else in Canadian Press territory (R. 457). Each of the two agencies also covenants that it will "rigidly enforce" its by-laws to the end that no member shall furnish his local news to anyone in the other agency's territory apart from such other agency and its members (R. 457–8).

THE GROUNDS OF THE DISTRICT COURT'S DECISION

The reasons given by the district court for holding that the AP by-laws relating to admission

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[84] Canadian Press by-laws, Art. XVIII, Secs. 3, 7 (R. 1887, 1888-9),

[85] Fngs. 133, 134, R. 2625–6; Ex. 1, R. 456, 458. What we have referred to as Canadian Press territory is the Dominion of Canada, Newfoundland, British West Indies, Bermuda and British Guiana.

of members are illegal are summarized later (*infra*, pp. 89–91). The grounds upon which this holding was rested largely controlled the court's ruling upon the other issues in the case, and the court, as to these issues, did little more than state its conclusions.

SPECIFICATION OF ERRORS TO BE URGED IN NO. 59 [66]

The district court erred—

(1) In qualifying, by the provisos contained in paragraph I B of the court's judgment, the injunction against adopting or observing any new or amended by-laws of AP having a purpose or effect like the provisions of the present by-laws of AP in respect of admission to membership therein.

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[66] The specification of errors to be urged does not include Nos. 10 and 11 of the Government's assignment of errors (R. 2669) relating to the holding of the district court that the Sherman Act does not apply to the restraints imposed by the provisions of the contract between AP and The Canadian Press which give to the latter the exclusive right to receive, in Canada, AP news reports. The Government believes this holding to be erroneous but of little practical consequence if the other restraints which are in issue in the present appeals are effectively barred. The question whether the prohibition in the Sherman Act of contracts and conspiracies in restraint of foreign commerce contains an implied exception of restraints which are not directly injurious to American consumers is, however, of far-reaching importance in cases involving cartel agreements with foreign interests. The Government believes that this question should be presented to this Court in a case which provides a full factual background for decision of that issue.

(2) In entering a judgment which enjoins the defendants from adopting and observing any new or amended by-laws of AP which prohibit a member from furnishing local news of spontaneous origin gathered by the member to persons other than AP and its members, only in connection with the existence of by-laws of AP which illegally restrict admission to membership therein.

(3) In failing permanently to enjoin the defendants from adopting and observing any new or amended by-laws of AP which prohibit a member from furnishing local news of spontaneous origin gathered by the member to persons other than AP and its members.

(4) In entering a judgment which enjoins the performance, or the making, of any agreement with The Canadian Press whereby AP obtains an exclusive right to the use in this country or elsewhere of news reports of The Canadian Press and its members, only in connection with the existence of by-laws of AP which illegally restrict membership therein.

(5) In failing permanently to enjoin the defendants from performing or making any agreement with The Canadian Press whereby AP obtains an exclusive right to the use in this country or elsewhere of news reports of The Canadian Press and its members.

SUMMARY OF ARGUMENT

I

Pursuant to its by-laws, applicants for membership in AP are excluded by reason of their competition with a member paper in the same city and field. Prior to 1942 such a member had a right of protest which prevented admission by ordinary vote of the Board of Directors; since 1942 such a member has a right to a substantial money payment, which likewise must be waived if an application is to be submitted to a vote of the Directors. Between 1900 and 1942, 1884 members were admitted where there was no competition or where a protest was waived, while in the same period only six were admitted over protest, each involving special circumstances. The exclusion is effected by combination and agreement. Each member agrees with every other member that he will not furnish to a nonmember the news which he receives from AP. This feature of the nontrading agreement, not illegal in itself, is illegal as a means of implementing and enforcing an exclusionary agreement designed to restrain competition.

The decisions under the Sherman Act from *Montague & Co.* v. *Lowry*, 193 U. S. 38, to *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, have repeatedly held that a combined refusal to deal which excludes others from that part of the market within the

scope of the agreement is an unlawful restraint of trade. The defense that the combining group has sought to protect its economic interests or even to counteract devastating evils and tortious infringement of property rights has been unavailing.

The decree below is also supported by numerous decisions holding that the pooling of facilities or information by competitors is a combination in unlawful restraint of trade if the competitors thereby obtain an advantage over persons from whom the fruits of such joint action are withheld. E. g., *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 596–597, 604–605. A similar principle was applied in *United States* v *Terminal Railroad Association*, 224 U. S. 383, holding that railroads owning terminal facilities are prohibited, by the Sherman Act, from refusing to admit other railroads to joint ownership and control upon equal terms. Whatever circumstances tending toward monopolization were present in that case are paralleled here, in view of the unique value of the news service furnished by an agency whose news-gathering membership includes 96 percent of the total circulation of morning newspapers and 77 per cent of afternoon newspapers, and every morning newspaper, except one, with a general circulation over 25,000.

Even if the courts must weigh the good and evil consequences of the combination, the result

in the present case is the same, as the court below held. Here competitors are excluded from the largest single source of news in the country. The detrimental effect of exclusion upon applicants for membership is beyond question. The injury to the public interest is likewise obvious. Not only is the successful operation of nonmember papers handicapped by the restraints, while the number of newspapers has been steadily declining, but the public is deprived of the advantage of receiving AP news through the medium of competitive papers which would give it different emphasis and selection and editorial comment.

The proprietary interest of AP members does not justify the exclusion of applicants for competitive reasons. The history of AP demonstrates that exclusiveness is not an essential element of value in the news which AP gathers and that the right to exclude a competitive newspaper is not necessary to protect the value of this news. From the beginning AP has had more than one member in the same city and field in many of the largest cities. This condition has not affected the retention of AP membership or the eagerness of others to share in it. Thus to eliminate the right to exclude a newspaper for competitive reasons does not introduce any new or untried principle into the structure of AP.

The exclusion from AP membership and news reports is not the action of a single trader exercising his independent discretion in selecting those

with whom he will deal. The exclusion is effected by an agreement among some 1250 independent newspaper enterprises. The membership agreement requires AP to put the competitive interests of those individual members ahead of those which would actuate it were it operating as a unitary organization. In the latter case it would seek to increase its profits and news coverage by expanding its newspaper clientele. Even if AP were a unitary organization, the exclusionary agreement would involve relinquishment of the power independently to select one's customers, in order to restrain competition of others with favored customers; as such, the agreement would be analogous to that held illegal in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227–230.

The cases involving commodity exchanges and cooperative associations cited by defendants do not deal with any question similar to that here presented, namely, whether an agreement between members of a membership association to exclude competitors of the individual members from certain trade violates the Sherman Act.

II.

The agreement of AP's regular members to give their local news exclusively to AP is in itself an agreement in unlawful restraint of trade. It is an agreement by a preponderant part of the entire industry that each will not deal with any nonmember respecting the local news which it gathers.

The agreement does not fall within the rule that a restrictive covenant necessary to the protection of property transferred is reasonable. In the present case the agreement is not between a single seller and buyer, but is a horizontal one by and between the various AP members. The agreement is therefore like that condemned in *Montague & Company* v. *Lowry*, 193 U. S. 38, where a dominant group of sellers and a dominant group of buyers agreed to deal exclusively with each other. The value of the local news furnished to AP would not be destroyed by making it available also to others with whom the individual members may wish to contract. That a nonexclusive report of local news gathered by a member is valuable is shown by the practice of AP itself in exempting its associate members from the exclusive obligation to report to AP, and by the action of other news services in seeking from subscribers merely an obligation to furnish such news on a nonexclusive basis. We do not suggest that such local news may not be required to be furnished to AP, or that it should be available to others in advance of furnishing it to AP.

The contract with Canadian Press giving AP the exclusive right to Canadian Press news in this country is likewise an agreement in unlawful restraint of trade. AP is given a monopoly of the only available comprehensive and speedy report of the news of a great neighboring country, a report contributed to and supported by substantially

all of that country's newspapers. No comparable substitute for this report could be built up by another news organization. The circumstances here involved make the Canadian Press contract much more clearly unreasonable than was the exclusive supply contract involved in *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 719, on the legality of which this Court was evenly divided. In that case the contract was terminable at will, applied to a product obtainable from other manufacturers, and protected a relatively small concern against the possible destruction of a specialized business if the supplier, the leading manufacturer in the field, were free to make the product for others or to market it itself.

III

The provisions of the judgment should be modified to give more adequate relief with respect to the modification of the AP by-laws respecting admission to membership. The provision that members in the same city and field as the applicant shall not have power to impose, or dispense with, any conditions upon his admission might not prevent the adoption of by-laws providing a more onerous basis for admission where there is a competing member than where there is not. It is submitted that the decree should provide that the procedure and conditions for admission shall be the same whether

or not there is an existing membership in the city and field of the applicant. It is also submitted that the decree should require the by-laws to contain not merely a declaration that the effect of admission upon the applicant's ability to compete with members in the same city and field shall not be taken into consideration, but also such further provisions as may be reasonably necessary or appropriate to secure observance of this declaration. When AP has prepared its proposed changes in the by-laws the ruling of the district court on the suggested supplementary provisions can be obtained prior to submitting the by-laws to a vote of the members.

IV

The decree will not convert AP into a public utility. The decree does not differ essentially from those commonly entered, whether negative or affirmative in form, against concerted refusals to deal. Such decrees, requiring the defendants to deal on equal terms with those previously excluded, do not rest at all upon a consideration of whether the enterprise is a public utility.

The decree does not exceed the bounds of appropriate equitable relief. It presents no unusual features of judicial supervision. *Cf. Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 549–553. The decree does not affect the right of AP to classify its members save on the basis of competition with other members,

and its result will merely be to enlarge the number of situations which have existed from the beginning in which there are competing member papers in the same city and field.

V

There is no abridgment of the guarantee of the freedom of the press. The argument to the contrary has as little substance as that which was rejected in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103. There is no interference whatever with editorial policies or the right of publication. So far as the concept of freedom of the press is at all relevant, the objectives of the constitutional provision will be furthered and not abridged by removing barriers erected by private combination against access to reports of world news.

ARGUMENT

I

THE AGREEMENT AMONG THE MEMBERS OF AP PROVIDING FOR EXCLUSION OF A NEWSPAPER FROM AP MEMBERSHIP AND AP'S NEWS REPORTS BY REASON OF THE FACT THAT THE NEWSPAPER COMPETES WITH A MEMBER NEWSPAPER IS IN ILLEGAL RESTRAINT AND MONOPOLIZATION OF INTERSTATE COMMERCE

CLARIFICATION OF THE ISSUE

The decree below seeks only to remove the concerted discrimination which has been practiced

under the AP by-laws in the admission, on the one hand, of applicants for membership who compete with an existing member in the same field and city and, on the other hand, of those who do not so compete. The decree does not require the admission of any or all applicants. It does not require the furnishing of AP news to non-members, either before or after publication.[67] It does not forbid classification of members upon admission according to the services to which they care to subscribe. The decree does none of these things, and we do not urge that it should.

What is unlawful, and what the decree enjoins, is discrimination in the conditions of admission based on the factor of an applicant's competition with a present member, and enforcement of such discriminatory exclusion by a preponderant part of the industry through a non-trading agreement. Thus the exclusion is not the act of a single trader independently selecting his own customers; it is the combined act of the separate newspaper enterprises which constitute the AP membership. Also, the agreement is an undertaking by the members that the commerce in news

[67] A separate question relates to the furnishing not of AP news but of spontaneous news of local origin by individual members, and the furnishing of Canadian Press news received by AP under an exclusive contract. These issues are the subject of the Government's cross-appeal and are discussed *infra*, pp. 104–115.

carried on through their collective agent, AP, shall be confined within the membership circle from which competitors of the several members are excluded. These factors present the question for decision under the Sherman Act.

AP has stated (Br. 3) that the question presented is whether it "must admit into membership and share its news 'copy,' before publication, with other competing papers, on equal terms." Thus stated, the question is obscured in ambiguity, for it seems to suggest that all applicants must be admitted to membership, and that after admission the news must be shared with all members without possibility of classification in service. (See also AP Brief, pp. 88–89). These, of course, are false issues. Thus obscured, the question is said to be whether AP must "become in effect a public utility and subject to regulation as such. That is what is involved in this case." In truth, the equality of terms imposed by the court below is directed to the conditions on the admission of applicants who do and those who do not compete with existing members in the same field and city. What the decree seeks to rectify is the concerted practices which have been designed to deprive those who compete with member papers, because of the fact that they do so, of the opportunity to participate in the benefits and responsibilities of the joint undertaking to which existing members and other applicants are admitted.

What is sought to be rectified, concretely, is a practice whereby during the period 1900–1942, 1884 new members were admitted to AP's exclusive current of trade in news by ordinary vote of the board of directors, where there was no competition with a member or protest therefrom, while during the same period only six members were admitted, each involving special and unusual circumstances, where the situation was competitive. See p. 63, *infra*. To correct this practice is not to create a public utility but is simply to enforce the mandate of Congress forbidding unlawful restraints of trade.

A. Facts and Considerations bearing upon the Legality of the Membership Agreement, Embodied in AP's By-laws relating to Admission of New Members

1. That a newspaper enjoying the right to AP news has an important competitive advantage over a newspaper not so entitled is beyond dispute. It is written into the very by-laws of AP. Under the amendments adopted in 1942 a newspaper, to obtain admittance, must pay to the AP member or members *with which it competes* a sum which ranges, in the case of morning newspapers in leading cities, from over $1,430,000 in New York to over $180,000 in Washington (*supra*, pp. 28–29). These sums represent a minimum evaluation by the members of the advantage in trade given by the members' "right" to exclude their competitors from AP news, as averred by the de-

fendants Tribune Company and McCormick (R. 149).[65] The Report of the Special Committee on Revision of the By-Laws presented at the 1942 membership meeting directly states that the payment required was to be a "recognition of the values of A. P. membership", the report also

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[65] The payment cannot be explained as a contribution required of the applicant on account of the assets which AP has accumulated and employs in rendering service. That it was solely by way of recompense for a dilution of the exclusory rights conferred by membership is shown by the fact that if the applicant was not in competition with a present member no payment was required. Second, as the district court pointed out (R. 2593), the payment was not computed upon the basis of the newcomer's share in AP's assets. Third, during the 42 years in which AP had been operating, no such contribution had been required of any new member. Fourth, a member, upon withdrawal from AP, receives no return on account of such contribution as it has made during its membership to AP's assets and, indeed, may be required to pay to AP a sum equal to 104 times its weekly assessment (By-laws, Art. VII, Sec. 7, R. 78).

See also the following statements by AP's General Manager concerning the required payment of 10% of the assessments since 1900, made at a meeting of its board of directors when this requirement was under consideration:

"Now, if as you say, 'Should it be eleven per cent', the answer is no. It should not even be nine per cent either. I want it to be an arbitrary amount, and a nominal amount, because I do not know what the result will be. I have not asked the treasurer what that would mean, but it is an amount, and ten per cent does not seem punitive * * *." (R. 1232, 1245.)

"Well, you say three years. This organization started operation in October, 1900. If you took the last three or five years you would increase the percentage which looks punitive. I wanted to take something that looks like a little. Ten per-cent doesn't sound like much." (R. 1234.)

stating: "That there are values inherent in Associated Press membership, no member will deny." [69]

Aside from this evaluation by the members of the preferential advantage given by their exclusive rights to AP reports, it is otherwise proved by the large amounts paid by newspapers to obtain membership, in one case $1,300,000 and in numerous cases amounts well into the hundreds of thousands of dollars, and by the recent rejection of an offer of $250,000 (*supra,* pp. 19–20, 32). The AP membership held by every morning newspaper with general-reader circulation of over 25,000 except the Chicago Sun (*supra,* p. 38) amounts to a unanimous declaration that for newspapers of this type AP news and other services contribute to a newspaper's success and, conversely, that inability to obtain them is a competitive handicap.

But the injury suffered when a newspaper is barred from the news reports of AP does not lend itself to precise money measurement. It involves a limitation of the character of the publication which can be issued. As the district court points out (R. 2595), there inevitably are differences in the news reports of the various news agencies, in contents, in treatment and emphasis, and in priority in time of the report. A newspaper receiving the three major services is best equipped since it can select, as the news comes in

[69] Pl. Req. Adm. 36–c, Ex. 24 (R. 197–8, 275, 276), admitted (R. 341, 429).

over the wire, the report which is first, or most colorful, or most detailed, or best suited to its needs. Furthermore, when AP reports are beyond a newspaper's reach the injury is more grievous than narrowing its freedom to choose from among three, to freedom to choose from among two, news services. The newspaper is cut off from the service which ranks first, whether judged by general public estimation, newspaper preference, or such objective standards as size of staff, expenditures, physical facilities, etc. (*supra*, p. 37). The injury suffered, from this aspect, is not dependent upon a finding or determination that AP news service is superior to others; the injury consists in being barred from the news service which, in a very limited field, is so widely regarded as ranking first and in barring opportunity to obtain the news reports of both AP and one or more of the two other news agencies supplying world news.

What the district court refers to as the "differential advantage" given by AP membership (R. 2593) is written into the structure of the AP by-laws. It is so written by the very different procedure and conditions which govern admission to membership when the applicant paper does, and when it does not, directly compete with a member paper. And the defendants in this proceeding are resisting change in the by-laws upon the express ground that the AP members

should be permitted to retain the competitive advantage given by their present exclusive and exclusory rights to AP news.[70]

The advantage in trade which the right to AP news gives is not drawn within the area of disputed facts by proof that some newspapers have attained relatively large circulations without AP news (Fng. 71, R. 2616), that there are non-AP newspapers in many small communities in which no existing membership stands as a bar (R. 1907, 1909–30), and that over the years there have been some instances in which newspapers have voluntarily turned from AP to UP (Fng. 74, R. 2616). A restraint, to be illegal, does not have to go to the point of putting a competitor out of business or making successful operation impossible, nor is a restraint disproved by showing that not every member of an industry suffers from it. "In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangement suppresses all competition."[71]

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[70] AP in its answer to the complaint states that if membership were freely open to any member "would enjoy no competitive advantage over others" and that its members have created "something of value", the "benefits" of which others should not be allowed to appropriate (R. 120, 121). As to like admissions by the defendants Tribune Company and McCormick, see R. 508.

[71] *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 44. To the same effect, see *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 466; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, n.

2. That those excluded from AP membership are excluded by combination and agreement is beyond dispute. The AP by-laws establish the rules for admission to membership and these by-laws constitute an identical contract between the members (Fng. 7, R. 2607).

3. That the competition of a newspaper with a present member is a ground for exclusion is declared on the face of the by-laws. The basis for admission is totally different when the applicant newspaper competes, and when it does not compete with a member, and such competition is the sole ground of differentiation. The by-laws further declare that the purpose of the separate categories is protection of the exclusory rights of the several members—assent to admission by the members competitive with the applicant automatically shifts him into the noncompetitive category. Not only was competition with a member paper a ground for exclusion, but actual exclusion in such cases was the contemplated and actual result. The requirements governing admission where there was competition were adopted as a substitute for an absolute veto power and as being, in the opinion of counsel, "the extreme limit to which an embodiment of the old veto power could be safely attempted" (*supra*, p. 23). As to actual exclusion based upon

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at p. 226; *Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255, 261.

the applicants' competition with a member, the figures on admissions for the years 1900–1942 tell their own story:

	Admissions
(1) No competition or affected members consent	1,884[72]
(2) Competition	6

The same story is told by the rejection of 95% of the membership applications in competitive situations where the holder or holders of protest rights had not waived their protests, and the favorable action, during a ten-year period, on 95% of all other applications (*supra*, p. 26).

The district court said that the evidence as to admission (or non-admission) of members in the past was, while pertinent and persuasive, not sufficient to establish beyond substantial question that the prior practice of exclusion would be continued under the by-laws as amended in 1942 (R. 2581). We refer to the evidence, not as proving this issue within the limits of the rules applying to summary judgment, but as proving beyond all doubt the practices prevailing during 42 years of AP's life, in the light of which the present by-laws are to be judged.

The by-laws as amended in 1942 continue the different requirements for admission where the applicant does, and where he does not, compete

[72] This figure represents the 1,890 members elected (Fng. 28, R. 2609), less the six elected by vote of members (*supra*, pp. 24–25). Each of the latter six admissions involved special and unusual circumstances (*supra*, p. 24).

with a member paper. It is further established that the change in the by-laws in 1942 was not prompted by any desire to remove barriers against competitors but by the hope of forestalling a judicial test of the legality of the by-laws (*supra*, p. 27). Applications for membership for two newspapers, located in different cities and under very different sponsorship, have been rejected under the amended by-laws and, as in the past, appeal was made to the members that to break down the principle of excluding competitors would be destructive of the values attaching to AP membership.[73]

4. Each AP member agrees with every other member that he will not furnish to a nonmember the news which he receives from AP.[74] The commerce in news flowing from AP to each member is thus, by agreement, brought to a stop when it reaches the member. The agreement not to sell or transmit AP news to any outsider may well be deemed, apart from improper membership restrictions, a reasonable means of protecting the value of this news and confining it to the newspapers contributing to AP's support. Cf. *International News Service* v. *Associated Press*, 248 U. S. 215. We refer to the nontrading agreement respecting AP news, not as in itself illegal, but as implementing the mem-

[73] *Supra*, pp. 32–35; R. 1167, Ex. D, R. 1171–4.

[74] By-laws, Art. VIII, Sec. 6, R. 80.

bers' agreement to exclude their several competitors from the commerce in news carried on within the membership circle. Those with whom the members may deal as to commerce carried on with and through AP being determined by agreement, those excluded therefrom are excluded by a combined refusal. And, as previously pointed out (*supra*, pp. 62–64), this action, taken pursuant to and as a part of the AP membership agreement, had as its purpose and effect restraining competition.

The distinction under the antitrust laws between the refusal of a single trader to deal and a combination or conspiracy not to deal has been repeatedly recognized. The former is held permissible (*United States* v. *Colgate & Co.*, 250 U. S. 300) but the latter is illegal "if the result be hurtful to the public or to the individual against whom the concerted action is directed."[78] The distinction rests in part on the fact referred to by the district court, "that a combined refusal to deal with others always has a weightier impact than that of an individual" (R. 2590). But the distinction, as applied to the facts in the present case, involves differences in kind as well as in degree.

[78] *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 614; *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 574; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440.

The interests of AP, as a single trader, would be furthered by expansion of its customers.[78] The restrictions on those whom it may serve are imposed, not for its protection, but to protect the competitive interests of the individual members. By the agreement, each member supports limitation on trade with competitors of other members in return for support of limitation on trade with his own competitors. To take a somewhat parallel situation, if a stock corporation organized for profit made an identical agreement with each of its stockholders that it would not, without the stockholder's consent, sell its product to the latter's competitors, this would at once be recognized to be a boycotting combination made for the purpose of suppressing competition and within the ban of the Sherman Act.

5. Newspapers are vendors of news and actively compete in gathering and reporting it. The agreement by AP members to use a common agent for this purpose eliminates competition among them as to the news reported by AP. The Government does not contend that the elimination of competition which results from acting through a common agent is in and of itself a violation of the Sherman Act (*Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344) or that the pooling by competitors

[78] See the somewhat extravagant lengths to which its subsidiary, Press Association, Inc., went in seeking radio broadcasting stations as customers (Pl. Req. Adm. 32-b, Ex. 9, R. 187, 223–34, admitted, R. 331, 426).

of facilities, information or other things of value is such a violation. But the combination becomes illegal when, in addition to serving the legitimate ends of economy or better knowledge of market conditions, it is employed to obtain for the members of the combining group an advantage in trade over others excluded from the fruits of joint action.

The above view, which the decisions support (*infra*, pp. 81–85), accords with a basic principle of nonprofit consumer cooperatives—that membership shall be open upon equal terms to all persons in the class of those served by the cooperative.[77] The principle is pertinent here since in this aspect of the case newspapers are consumers of news and the functions of AP are those of a consumers' cooperative.

6. The fact that the newspaper enterprises of which AP is composed have organized themselves as a membership corporation, which issues mem-

[77] Webb, *The Consumers' Cooperative Movement* (1921), p. 9; Warbasse, *Cooperative Democracy* (3d Ed. 1936), p. 15; *Consumers' Cooperation in the United States, 1936*, Bureau of Labor Statistics Bulletin No. 659, pp. 18–19, 38; *Organization and Management of Consumers' Cooperatives and Buying Clubs*, Bureau of Labor Statistics Bulletin No. 665, p. 16; *Report of the Inquiry on Cooperative Enterprise in Europe* (U. S. Gov't Printing Office, 1937), pp. 19–20.

A producers' cooperative may stand on a somewhat different footing. It is organized to sell goods which its members produce and limits on the volume of goods it can market advantageously may justify some restrictions on the scope of its membership.

bership certificates transferable under certain conditions and engages in extensive operations, gives to their combination no special sanction or immunity. The courts, in applying the Sherman Act, are concerned with the substantive effect of the defendants' conduct, not with "the mere form in which the assailed transactions are clothed" and the policy of the statute cannot be frustrated "by resorting to any disguise or subterfuge of form." [78] The Sherman Act "aims at substance" and a combination in unreasonable restraint of trade "cannot escape because it has chosen corporate form"; and if it is not of this kind "it is not to be condemned because of the absence of corporate integration." [79]

B. The Agreement of AP Members under which a Newspaper which Competes with a Member Newspaper is by Reason of such Competition Excluded, Through a Combined Refusal to Deal, from Commerce in News Obtained by and through the Common Agent of the Members, AP, is in Illegal Restraint and Monopolization of Interstate Commerce

A combined refusal to deal which excludes others from that part of the market within the scope of the agreement has repeatedly been held to be a restraint of trade prohibited by the Sherman Act. Whether or not it is the kind of restraint, like price-fixing, which permits of no justification has

[78] *American Tobacco Co.* v. *United States*, 221 U. S. 106, 180, 181.

[79] *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 377.

not been specifically declared by this Court. But in those cases where the defendants have attempted justification of this type of restraint, the command of the statute has been held to prevail. Protection of the economic interests of the combining group against encroachment upon the distributive functions which they perform (*Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 613) and protection of "the manufacturer, laborer, retailer and consumer" against "devastating evils" afflicting the industry (*Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 467) have been held not to be grounds of justification.[80]

The defendants have sought to differentiate decisions condemning restraints effected by a combined refusal to deal upon the ground that such combinations have been generally directed at exercising, by group pressure, some control over the trade practices of others, a feature absent from the combination of AP members. But combinations not to deal have been equally condemned where their purpose was to confine certain trade to members of the group. The test in either case is whether the combination effects a restraint or monopolization of trade prohibited by the statute. That classification of the decisions on the basis suggested has little significance is indicated by

[80] To the same effect, see *Anderson* v. *Shipowners Association*, 272 U. S. 359, 363; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 43.

the fact that in some cases the decision can be put in either classification, or both, depending upon the view taken of the defendants' basic objective.

In the combination of retailers not to purchase from wholesalers who sold direct to consumers, which was before this Court in *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, the retailers' basic purpose was to preempt for themselves trade with consumers; it was incidental thereto that the combination, if successful, would compel certain wholesalers to change their selling practices. The purpose of the combination of manufacturers of ladies' garments embodying designs which they had originated, considered in *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, was to confine to these manufacturers the trade in garments embodying their "original" designs; accomplishment of this purpose would result in putting a stop to the manufacture and sale of garments copied from these designs.

In a number of other cases this Court has held that the Sherman Act prohibits combinations to refuse to deal which, like the combination of AP members, had the purpose and effect of excluding others from certain trade. In the early case of *Montague & Co.* v. *Lowry*, 193 U. S. 38, tile dealers in San Francisco and eastern manufacturers of tiles formed an association, the manufacturers agreeing to sell only to members

of the association and the dealers agreeing to buy only from the manufacturer members. This Court held that the combination illegally restrained the trade of a dealer who, because of the combination, had been unable to purchase tiles from the manufacturers with whom he had previously dealt. Just as in the present case, there was no absolute exclusion of others from the trade which the parties sought to preempt. The constitution of the association provided for admission of "all acceptable dealers" and the plaintiff partnership had not sought admission, but these facts were held not to remove the element of restraint. (193 U. S. 38, 46–47). As this Court said (p. 47), the question of admission was "a matter for the arbitrary decision of the association," and the combination could not legally put the plaintiffs "under obligation to become members in order to enable them to transact their business as they had theretofore done."

In *Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501, the members of an association of billposters agreed to accept certain kinds of work only from 12 selected solicitors and threatened to withdraw patronage from advertisers, and from lithographers of posters, doing business with billposters not within the association. The agreement was held to be in illegal restraint of the trade of concerns which solicited billposting advertisements and contracted to design, purchase, and post them. While the agreement had other elements of ille-

gality, the impact upon the plaintiffs was by virtue of the combined refusal to deal, and the decisions to which this Court referred as establishing illegality (pp. 511–512) dealt with combinations of this kind.[1]

In *Anderson* v. *Shipowners Association*, 272 U. S. 359, certain associations of Pacific Coast shipowners and their members had agreed that the latter would employ only seamen selected by the associations. This Court, in holding the agreement illegal, said (pp. 362–363):

> If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper and put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear.

In like manner, each AP member has precluded itself from transmitting news obtained through its agent, AP, to any nonmember newspaper competing with another member without the previous approval of that member.

Another instance of an agreement not to deal of the kind being considered is *Binderup* v. *Pathe Exchange*, 263 U. S. 291.

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[1] The citation of *Swift & Co.* v. *United States*, 196 U. S. 375, obviously related to the question whether the commerce which was restrained was interstate.

Of the foregoing cases, the district court cited *Montague & Co.* v. *Lowry*, and the *Fashion Originators' Guild* case as standing for the principle that a combination which excludes, or tries to exclude, outsiders "from the business altogether", is unconditionally unlawful (R. 2589). But in these cases "the business" from which outsiders were to be excluded was simply a particular segment of trade, not more comprehensive than the trade—the news reports of AP—from which the present defendants aim to exclude their competitors. In the *Montague* case the sale of unset tiles to which the combination related was less than 1% of the business of the tile dealers in San Francisco (193 U. S. 38, 46) and in the *Fashion Originators' Guild* case the defendants sold only some 38% of the women's garments wholesaling at $6.75 or more (312 U. S. 457, 462).

Agreements not to deal have also frequently been entered into for the purpose of establishing limitations or conditions which others must meet if they wish to do business with the combining group. The following three decisions holding such agreements illegal under the Sherman Act are illustrative:

In *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 587–589, 601, 605, leading sugar refiners had agreed to "refuse to deal with" any person who was carrying on both a brokerage and a warehouse business. In *Paramount Famous Lasky*

Corp. v. *United States*, 282 U. S. 30, the principal distributors of motion pictures agreed that they would enter into exhibition contracts only with exhibitors who would sign a contract containing specified provisions for arbitration of all disputes arising thereunder. In *United States* v. *First National Pictures, Inc.*, 282 U. S. 44, the same group of distributors agreed upon the conditions which they would exact before making a contract with any purchaser of a motion picture theatre which had been sold for the purpose of avoiding fulfillment of its exhibition contracts.

Agreements not to deal have involved a variety of other situations. In *American Medical Assn.* v. *United States*, 317 U. S. 519, the purpose, as in the instant case, was to protect the economic interests of the individual members of a nonprofit membership corporation. A rule adopted by such a corporation prohibited its doctor members from having professional relations with any individual or organization not on an "approved" list. When this rule was used to restrain the activities of another nonprofit corporation engaged in furnishing medical and hospital services to Government employees, this was held to be a restraint of trade in the District of Columbia within the condemnation of Section 3 of the Sherman Act.

We believe that the rule to be drawn from the cases, taking them as a whole, is that an agreement to exclude others from certain trade is a

restraint prohibited by the Sherman Act if the actual and intended effect is to restrain the competition of those excluded. There may, of course, be question whether a particular combination is of this character, as there may be room for doubt whether an agreement is a price-fixing one. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218–223. But if a combination is found to be of the kind described, the Government submits that, as in the case of price-fixing agreements, the law forecloses justification upon the basis of judicial appraisal of the good and evil consequences of the combination. See *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission, supra*, pp. 467–468.

The district court took a different view of the law, saying that "a combination may be within its rights, although it operates to the prejudice of outsiders whom it excludes" (R. 2590). The cases cited for this statement—*Anderson* v. *United States*, 171 U. S. 604; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; *Matthews* v. *Associated Press*, 136 N. Y. 333 (1893)—do not support it. No question of exclusion was presented in the *Appalachian Coals* case. The *Anderson* case has been held by this Court to be inapplicable to combinations not to deal, upon the ground that the decision in that case rested upon the holding that no *interstate* commerce was subjected to re-

straint.[82] And in the *Mathews* case the court did not consider any question as to the application of the Sherman Act but dealt solely with restraint of trade under doctrines of the common law.

But if the district court had been correct in believing that not all combinations which exclude competitors to their injury are banned by the statute, the question of what circumstances or conditions would stamp such a combination with illegality would become pertinent. It is established that it may be illegal although the exclusion is less than absolute[83] and although competition is not wholly suppressed or monopoly achieved.[84] In the present case, competitors are excluded from "the largest and most popular" of the three news services (R. 2594). Is this enough to make the restraint oppressive and illegal? It is incontestably a competitive advantage to a newspaper to have both of the two leading news services, and AP members may have both of these services but their combination limits competitors to one of them. Do these circumstances render the restraint illegal? Or does the combination become illegal, as the defendants appear to contend, only if AP

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[82] *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn.*, 274 U. S. 37, 49; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 613. See also *Swift & Co.* v. *United States*, 196 U. S. 375, 397–398.

[83] *Montague & Co.* v. *Lowry*, discussed *supra*, pp. 70–71; *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, discussed *infra*, pp. 84–85.

[84] See cases cited n. 71, *supra*, p. 61.

has a monopoly of the news agency field? The last supposition, which would make the prohibition of restraints of trade in Section 1 of the Act substantially synonymous with the prohibition of monopolization of trade in Section 2, is belied by the whole course of decision under the Sherman Act.

In *Minnesota Tribune Co.* v. *Associated Press*, 83 Fed. 350 (C. C. A. 8), the plaintiff newspaper asserted that under its contract with AP's predecessor (AP of Illinois) it was given the right to the exclusive use in Minneapolis of that agency's news reports. The court, of which Justice Brewer was a member, after holding that the contract was not sufficiently definite to support a suit for specific performance, significantly observed (p. 357) that the court, but for this conclusion, would have been compelled to consider a question which had not been raised in the briefs or oral argument, namely, whether equity should enforce an agreement--

> which would seem to have an obvious tendency to create and perpetuate a monopoly of the news, by limiting the service of news reports to a single newspaper in a large city, and placing it within the power of the proprietor of such newspaper to prevent other newspapers from having access to the same sources of information.

We submit that *United States* v. *International Harvester Company*, 274 U. S. 693, upon which

appellants Tribune Company and McCormick rely (Br. 20), does not in any respect support the position of the defendants in the present case. In a suit brought by the United States under the Sherman Act seeking dissolution of International Harvester a consent decree was entered in 1918 which required the company to sell to independent manufacturers three of its five lines of harvesting machines and prohibited the company from having more than one sales representative or agent in any city or town, the declared object of the decree being to "restore competitive conditions" in agricultural implements. The company's dominance of the trade (about 67% in 1918) and its earlier practice of selling its different lines of machines through different dealers under exclusive contracts, thus frequently preventing competitors from obtaining adequate retail outlets, were reasons for the single-dealer limitation.

In a proceeding by the United States brought under a provision of the decree authorizing it, after a stated time, to apply for further relief if this should be necessary "to bring about a situation in harmony with law", this Court found that the single-dealer limitation had been effective in promoting competition and that the company, because of this limitation, had lost the services of almost 5,000 dealers. 274 U. S. 693, 704–705. The single-dealer limitation was not in issue before this Court in the proceeding to obtain additional

relief, but what is important is that this limitation of the consent decree has no bearing on the question of eliminating the restraints of trade which result from denying to competitors of AP members the news service which AP is engaged in furnishing to newspapers. Assuming that UP and INS benefit to some extent from AP's membership restrictions, that fact does not justify continuance of these illegal restraints. And it should be noted that since 1915, when AP repealed Section 7, Article VIII, of its original by-laws (R. 53–4, 63), AP has placed no limitations of any kind on the receipt by its members of other news services.

Appellants Tribune Company and McCormick also rely (Br. 24–25) upon the action of the Federal Communications Commission in adopting regulations dealing with chain broadcasting which, while they prohibited contracts between a network and a broadcasting station which would prevent a network from supplying to another station serving the same area a program not taken by the contracting station, permitted contracts giving a station the first call, in its service area, upon the network's programs. The validity of the regulations was sustained, as against the attack of two broadcasting chains, in *National Broadcasting Co. v. United States*, 319 U. S. 190.

We submit that this administrative action by the Federal Communications Commission is no precedent for the exclusion of competitors from AP's service. The standard fixed by the statute governing exercise of the Commission's licensing power is the "public interest, convenience, or necessity." A fundamental characteristic of radio broadcasting, conditioning all regulation, is that "the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation on the number of stations that can operate without interfering with one another." 319 U. S. 190, at p. 213. Under these circumstances the Commission has "the burden of determining the composition" of the traffic over these limited facilities (*idem.*, p. 216) and they are not given the fullest use which the public interest demands if the same commercial program is broadcast by two stations serving the same listeners; or at least so the Commission might reasonably conclude.

If program duplication in the same area is a wasteful use of radio's limited facilities, such duplication does not meet the statutory test of the "public interest" which the Commission is required to enforce and apply and the Commission was warranted in sanctioning contracts which prevent such duplication. The exclusive use given by the contract would not be in restraint of competition since the governing statute does not permit this kind of competition.

The report which the Commission issued in connection with its regulations gives recognition to the above considerations. The report states that the Commission is not charged with the duty of enforcing the Sherman Act, but that it should administer its regulatory powers in the light of the purposes which this act is designed to achieve. The report declared that it was not the Commission's function "to apply the anti-trust laws as such," but that it was its duty to refuse licenses to persons engaging in practices which prevent "making the fullest use of radio facilities", and that this was "the standard of public interest, convenience or necessity which we must apply to all applications for licenses." *Idem.*, pp. 223–224.

C. The Defendants, by Agreeing to Gather, Distribute, and Interchange News Jointly and Collectively and to Deny to Competitors Opportunity to Participate in the Advantages in Trade Derived from such Collective Action, have Illegally Restrained Trade

Where competitors agree to pool facilities or information there is a combination in unlawful restraint of trade if they thereby obtain an advantage over persons from whom the fruits of such joint action are withheld. In *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, the Institute circulated among its members but withheld from purchasers certain statistical information compiled from data furnished it by its members. There was no evidence or finding that

this information was employed to fix prices or to limit production, but the district court found that the information gave to the refiners a wider knowledge of trade conditions than was available to their customers, and this Court held that the defendants thus "obtained an unfair advantage with respect to purchasers and effected an unreasonable restraint". The decree, which this Court specifically considered and approved, enjoined the joint collection and distribution of statistical information, "to the extent that said information is not made, or is not readily, fully and fairly available to the purchasing and distributing trade." [85]

Maple Flooring Manufacturers Assn. v. *United States*, 268 U. S. 563, 586, held that trade associations which "openly and fairly gather and disseminate" statistical information do not thereby unlawfully restrain trade, and the Court throughout its opinion (pp. 573–4, 582–3, 585) emphasized the full publicity given to the statistical information collected by the association. One of the grounds upon which *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, was distinguished (p. 581) was that the information which in that case was collected and distributed among members was "treated as confidential and concealed from the buyers".

[85] *Sugar Institute, Inc.* v. *United States*, *supra*, pp. 596–597, 604–605; *United States* v. *Sugar Institute, Inc.*, 15 F. Supp. 817, 831–833, 897–899 (S. D. N. Y.).

In the *American Linseed* case and in *American Column and Lumber Co.* v. *United States*, 257 U. S. 377, information exchanged among the members of a trade group as to their prices, sales, production, etc., was used as an adjunct to, in the former case, fixing prices, and in the latter case, concertedly promoting high prices and limited production but without agreement upon specific prices or specific production limits. The advantage which the members gained by pooling information as to their individual businesses but withholding this from others in the trade was pointedly referred to in the *Linseed* case. The Court there said (pp. 389–390) that the producer members of the combination, with "intimate knowledge of the affairs of other producers * * * went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions." In the *American Column* case this Court, in rejecting the contention that the defendants had merely undertaken to furnish to the widely scattered units of the industry the equivalent of the information reported in newspapers and Government publications respecting dealings on boards of trade or stock exchanges, said (p. 411): "One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only * * *."

If independent business units violate the Sherman Act when, by means of joint action in pooling information, they obtain an advantage over those with whom they deal, as held in the *Sugar Institute* case and clearly intimated in earlier trade association cases, *a fortiori* the members of AP violated the Sherman Act when they agreed to act through a common agent in collecting the news which is the lifeblood of their trade but to deny to their competitors the advantages flowing from participation in such joint and collective action. This agreement more directly restrains competition and is more monopolistic in tendency than the restricted dissemination of pooled statistical information held to be illegal in the *Sugar Institute* case on the basis of earlier decisions of this Court.[56]

The holding in *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, is likewise of great significance. This was a proceeding under the Sherman Act to dissolve a combination among certain railroads serving St. Louis by which each became the owner of an equal amount of the stock of a corporation which had acquired all available facilities for connecting railroads on the eastern

[56] The district court's decision that a withholding of pooled information which gives an advantage in trade over others is illegal was rested upon the *American Column*, *Linseed Oil*, and *Maple Flooring* cases (15 F. Supp. 817, 897–899). This Court affirmed the holding without discussing the relevant authorities (297 U. S. 553, 597).

side of the Mississippi with those on the western side. The agreement gave to the combining railroads, referred to as proprietary, the right to use the terminal facilities of their joint subsidiary and to veto their use by non-proprietary railroads although actually such railroads had been permitted to use the facilities upon paying the same charges paid by proprietary railroads (see p. 400). This Court held (pp. 411–412) that a plan should be submitted providing for admission of any railroad to joint ownership and control of the terminal properties upon such terms "as shall place an applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies" and that, in the event of failure to agree upon such a plan, the combination should be dissolved as in violation of the Sherman Act.[87]

The present defendants point to the monopolization of terminal facilities as a distinguishing feature and to this Court's statement (p. 405) that

[87] For a like decision, see *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 747; 217 Fed. 656 (N. D. Ohio), appeal dismissed, 245 U. S. 675.

See also *United States* v. *New England Fish Exchange*, 258 Fed. 732 (D. Mass.), involving an exchange operated by wholesale fish dealers which limited trading privileges to themselves and to such other dealers as they chose to grant this privilege. The court (p. 748) found that the combination violated the Sherman Act but held that the proper relief was, not to dissolve the exchange, but to open it up to outside dealers "upon equal and reasonable terms."

"in ordinary circumstances" independent railroads might combine for the purpose of acquiring terminals for their "common but exclusive use".[88] But we submit that there is in the instant case an effective monopolization of news-service facilities, of unique character and value, analogous to the effective monopolization of terminal facilities found to exist in the *Terminal Railroad* case.

The unique value of the news reports furnished by an agency composed of and controlled by newspapers representing every shade of opinion and section of the country is admitted. These characteristics of the organization furnish "an invaluable guarantee that the promise and claim made by each news-agency—that it presents the news without any political or sectional bias—will in fact be fulfilled."[89] AP's answer to the complaint likewise avers: "The impartial and unbiased character of the news furnished * * * by AP is assured by the fact that the membership represents a cross section of opinion on all issues of general interest" and by the membership's power to control AP and to discipline any member (R. 119).

That AP has an effective monopoly of furnishing news by this type of organization is beyond

[88] The Court added that excluded railroads would ordinarily have the right and power to construct their own terminals.

[89] Complaint par. 66 (R. 18), admitted (R. 126, 141-2).

dispute. The membership includes 96% of the total circulation of morning newspapers and 77% of the circulation of afternoon newspapers (*supra*, p. 38). The remaining 4% of morning circulation and 23% of afternoon circulation are plainly inadequate to support another newspaper-owned news service.[20] But even if they would support it the organization would lack the wide representative membership which gives value to the news service of AP.

The observations of the district court are pertinent in the present connection. It said (R. 2593–4):

> It [AP] is not a monopoly in the sense that membership is necessary to build up, or support, even a great newspaper. * * * But monopoly is a relative word. * * *

[20] The fact that many AP members also receive the service of UP or INS, or in some cases both services, does not indicate that another newspaper-owned service could exist alongside of AP. These privately owned agencies have important supplementary outlets and sources of support, such as numerous non-newspaper clients (radio stations, foreign newspapers and others) and specialization in features (such as comics) and reporters having a public following.

Of UP's 1921 subscribers in August 1942, less than half, 817, were daily English-language newspapers published in the United States (Williams affidavit, R. 1260). On the basis of expenditure, UP's feature services, conducted through a subsidiary, were in 1942 more than one-fifth of its news service (Williams affidavits, R. 1263, 1464). In the case of INS, the features business, conducted by another department of the same corporation, was in 1941, on the basis of expenditure, more than double the news-service business (Connolly deposition (AP), R. 2105–6).

> Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose. *Fashion Originators' Guild* v. *Federal Trade Commission*, 114 Fed. (2) 80, 85 (C. C. A. 2). And yet that advantage alone may make a monopoly unlawful.

AP cites (Br. 71–72) *Prairie Farmer Pub. Co.* v. *Indiana Farmer's Guide Pub. Co.*, 88 F. (2d) 979 (C. C. A. 7), certiorari denied 301 U. S. 696, 302 U. S. 773, as holding that common action by independent concerns which gives some competitive advantage may be legal under the Sherman Act.[21] In that case the publishers of seven farm papers, each circulating primarily in one State, offered to take advertisements for insertion in all seven papers for a less amount than the same advertisements would cost if they appeared in six of the papers. In a treble-damage suit by the publisher of a farm paper circulating in two of the

[21] The case had twice previously been before this Court. *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268, held that the ground upon which the district court had directed a verdict for the defendants and the ground of affirmance by the Circuit Court of Appeals were erroneous. *Prairie Farmer Pub. Co.* v. *Indiana Farmer's Guide Pub. Co.*, 299 U. S. 156, held that the Circuit Court of Appeals had affirmed a verdict for the plaintiff upon the basis of a misinterpretation of the first decision by this Court.

States in which the defendants had papers, the court held that the evidence showed that the group rate was offered to attract advertising which otherwise might go to farm papers having a national circulation, and that the effect of the group rate "was only indirectly and incidentally to put appellee [the plaintiff] in the position of a less favored competitor" (88 F. (2d) 979, 982–983). Since no conspiracy to restrain the plaintiff's trade was shown, the action failed. In contrast, the AP membership agreement is framed in terms of excluding competitors from the benefits of participation in their joint news-gathering undertaking.

D. The Restraints Imposed by the Exclusory Provisions of the Membership Agreement must be Adjudged Illegal upon any Balancing of the Interests of the General Public which they Threaten and the Proprietary Interests of AP Members which they Serve to Safeguard

The Government submits that, for the reasons already given, the restraints imposed by the AP membership restrictions are clearly illegal. The Government therefore believes it unnecessary to apply the test used by the district court, whether the interests of the general public which are threatened with injury are of greater import than the exclusive privileges which the AP members seek to protect. If, however, such an inquiry is necessary or appropriate, the Government contends that the district court correctly ruled that

the Sherman Act, designed to protect against restraints on competition injurious to the general public, prohibits the restraints imposed by the AP membership restrictions. We summarize here the reasoning by which the district court reached its final conclusion as to the illegality of the membership restrictions.

The district court held that the agreement among AP members is in restraint of trade in that it limited the members' freedom to relay to others news received through their collective agent, AP, and the local news which the members themselves gather (R. 2588). The court classified the combinations which the Sherman Act makes unconditionally illegal as embracing those to fix prices, to exclude others altogether from a business, to extend the monopoly of a patent or copyright beyond the terms of the statutory grant, and to effectuate a restraint by illegal means (R. 2589–90).

In a situation not within these classifications a court, it was said, "is forced to weigh the advantages gained by the combination against the injury done to the public" and the decisions furnish "no more definite guide than that." Combinations not to deal border closely on illegality but are not necessarily illegal even though they operate to the prejudice of those excluded from certain trade.[92] While balancing the value of the

[92] See prior discussion of this conclusion of the district court, *supra*, p. 75.

opposing interests is an essentially legislative function, there is legislative warrant for doing this since Congress has incorporated into the Sherman Act "the changing standards of the common-law", and the law of torts, of which restraint of trade is a branch, is likewise judge-made law. (R. 2590–1.)

Applying this test to the case in hand, if the trade from which others were excluded had been fungible goods, "it would be a nice question whether the handicap upon those excluded from the combination, should prevail over the claim of the members to enjoy the fruits of their foresight, industry and sagacity." In that event it would be necessary to weigh the interest of the AP members against that of the excluded newspapers. But here the interests of the newspaper industry are not conclusive—

> for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. (R. 2594–5.)

Exclusion from AP service limits to an important degree the news upon which a newspaper

may draw, respecting not only quantity and timeliness but also coloration and emphasis. The interest of the public is not adequately served by the fact that the news of AP is published in a single local newspaper. The basis for editorial comment is thereby limited. As news, the report of an event may be omitted, printed in part, buried in a back page, or served up with headlines pointing this way or that. (R. 2595–6.)

We submit that the district court was right in holding that denial by private agreement, for competitive reasons, of access by newspapers to news reports which are essential working tools in fashioning their product, infringes upon an interest of the general public which is paramount to the defendants' proprietary interest in excluding competitors from the collective news-gathering enterprise in which the defendants are engaged.

E. Exclusion of Newspapers for Competitive Reasons cannot be Justified as a Reasonable Means of Securing for the AP Members that Part of the Value of AP News which Inheres in its Exclusiveness

The defendants contend that because the value of news depends, from the competitive standpoint, to a considerable degree on its exclusiveness, the barring of competitors of AP members from participation in the collective news-gathering undertaking is a reasonable means of preserving for each member the exclusiveness, and hence the value, of the news gathered by AP on behalf of

all members. The defendants imply that to eliminate the right to exclude newspapers for competitive reasons would strike a body blow at news collection by this type of an organization.

We believe that the defendants' restraints cannot be justified upon such grounds. Certainly this is so if, as we have previously contended (*supra*, pp. 68–75, 81–87), the restraints growing out of the exclusion of competitors are of a kind forbidden by the Sherman Act and their legality therefore does not depend upon judicial appraisal of their bad and good consequences or of the relative value of the interests which are respectively threatened and promoted. If the Court does not accept this view, the suggested defense is likewise unavailing if the defendants' agreement, by operating to deny to newspapers access to important news sources, threatens a public interest which outranks any interest which the defendant newspaper proprietors may have in barring others from participating in their collective enterprise (*supra*, pp. 89–92).

While the Government therefore does not believe that the reasonableness of the defendants' restraints, based upon the analogy of ancillary restraints or otherwise, is open for consideration, it wishes to point out that AP's own history and operations indisputably refute the contentions (1) that exclusiveness is an essential element of value in the news which AP gathers and (2) that the right to exclude a competitive newspaper from AP news is necessary to protect this value.

The defendants argue that if AP news must be shared with any competitor who desires to become a member, this substantially eliminates exclusiveness as an element of value in the news which AP gathers. It is further suggested that it is a serious question whether an impairment of such value may not materially impair the attractiveness and vitality of gathering news by a collective, newspaper-controlled organization such as AP and sow the seeds of AP's disintegration. The history of AP, however, establishes the contrary. AP has always had more than one member in the same city and field in a number of cities.[93]

[93] At the present time there are, in the morning field, four AP members in New York (R. 1082), four in Boston (R. 1080), two in Chicago (R. 1078, 1211), two in Los Angeles (R. 1077); two in San Francisco (*ibid.*), and two in Philadelphia (R. 1083). In the afternoon field there are five AP members in New York (R. 1103, 1113), four in Boston (R. 1097), three in Chicago (R. 1092), two in Baltimore (R. 1097), two in New Orleans (R. 1096), and two (one presently inactive) in Philadelphia (R. 1107).

In the past two or more memberships in the same city and field unquestionably existed to a greater degree than today, as mergers of newspapers as well as outright discontinuance of publication have reduced the number of newspapers in large cities. Eight Chicago newspapers holding AP membership have ceased publication since 1900 (McCormick affidavit, R. 1310). Most of the newspapers in metropolitan areas both in the morning and evening fields were original members of AP, with the exception of the Scripps papers, several recently launched Hearst papers, the New York Sun and the Washington Times (Noyes affidavit (AP), R. 1424). The number of daily newspapers in the United States in the 25 largest cities of the country declined from 153 in 1900 to 72 in 1942 (Lee affidavit, Ex. 7, R. 1056).

In these cities, where the member had no exclusive right to AP news, AP membership and service have been retained by those who had them and have been eagerly sought by those who did not.[91] The AP membership in such cities has, in effect, proclaimed that the advantages of cooperative news gathering immeasurably outweigh the disadvantage of not having an exclusive right, within the particular member's field and city, to news gathered in this way.

To eliminate the right to exclude a newspaper for competitive reasons is not to introduce a new or untried principle into the structure of AP. To eliminate such right does not destroy any attribute of AP news essential to the successful functioning of a news-gathering agency operating on behalf of, and subject to the control of, its newspaper members. To eliminate such right is to destroy only the increment of monopoly value enjoyed by the present members by virtue of the power to exclude competitors given by the membership agreement.

[91] In Chicago $1,300,000 was paid to obtain a morning membership and in New York over $300,000 was paid merely to prevent a competitor from obtaining a morning membership (*supra*, pp. 19–20) although such memberships did not give any exclusive right to AP news in the newspaper's city and field. See also the valuation which the AP members have recently placed on AP membership and service in precisely those situations where the news received would not be exclusive (*supra*, pp. 57–59).

It should be noted that the Government is not attacking the validity of the provisions of the by-laws which prohibit AP and any member from giving AP news to a nonmember.[35] These provisions protect the exclusiveness of AP news as against those who have not contributed to its cost and who have not accepted the other obligations which membership entails.

F. Neither in Form nor in Substance is the Exclusion from AP Membership and News Reports the Act of a Single Trader Exercising his own Independent Discretion in Selecting Those with whom he Will Deal

AP urges (Br. 66–68) that this Court should ignore the fact that exclusion of competitors from the commerce in news which the members carry on through AP is by virtue of agreement among some 1,250 independent newspaper enterprises and should treat the exclusion as if it were the act of a single trader independently selecting his customers. The grounds upon which this plea appears to be based are (1) that news collection through a cooperative form of organization serves certain useful purposes and (2) that, as applied to the restraints here involved, the distinction between agreement of a group not to deal with outsiders and a single trader's refusal to deal is one of form, not substance.

As to the first ground, it is sufficient to refer to the established rule that a combination which

[35] By-laws, Art. VII, Sec. 4, R. 77; Art. VIII, Sec. 6, R. 80.

promotes certain desirable objectives does not, by reason of this fact, obtain a license to impose restraints of trade prohibited by the Sherman Act.[99] The rule is *a fortiori* applicable where, as here, the desirable objectives which cooperative action may promote are wholly separable from the restraints of trade resulting from membership restriction, as is attested by the long-standing and satisfactory co-existence of competitive member papers in many cities. See pp. 94–95, *supra*.

Equally untenable is the second ground advanced: that there is no difference in substance between the combination of most of the country's leading newspapers to collect news through a common agent and news collection by a stock corporation organized for profit such as UP or INS. Among important differences are: AP as the common agent of its members is backed by the resources of all member papers and hence requires little capital contribution or reserves since it can always, by assessment, recoup costs of operation, whereas the ordinary stock corporation has the resources only of its own capital and earning power. It operates free from income tax liability, and its members, by receiving

[99] *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 613; *Anderson v. Shipowners' Ass'n*, 272 U. S. 359, 363; *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 43; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 467–468.

service at cost instead of at cost plus the news agency's normal profit, share in the profits incident to the news-collection business without paying a tax on dividend distribution of income. The reciprocity of agreement incident to the cooperative form of organization enables it to obtain exclusively the local news of its members [97] whereas corporations such as UP and INS, serving the same newspapers as AP, cannot obtain local news from them even on the non-exclusive basis provided for in contracts with non-AP subscribers.

A further significant and vital difference is that the restraints of trade resulting from the denial, for competitive reasons, of AP membership and news are directly and solely due to the organization of AP as a cooperative functioning under the rules and limitations agreed upon by its members. If AP were a stock corporation organized for profit it would seek to increase its profits and news coverage by expanding its newspaper clientele. The membership agreement, however, requires AP to put the competitive interests of its several members ahead of those which would actuate it were it operating as a unitary organization. AP recognizes this by asserting (Br. 17) that its restriction

[97] At one time AP's board of directors declared that the right to obtain exclusively a member's local news was a contribution "quite as valuable as the weekly sum he pays as his share of the expenses of the organization" (Complaint, par. 72, R. 20, admitted R. 126, 141–2).

of membership "has greatly facilitated and stimulated the growth of competitive news-gathering services". Notwithstanding AP's contrary suggestion (Br. 14–15, 45), it is clear that if the interests of AP are considered from the standpoint of a functioning entity rather than from the standpoint of the competitive interests of its individual members, AP benefits from additions to membership in a city and field where there is a member. Under the requirement for report of local news, additional membership augments AP's news coverage.[28] Additional membership likewise adds to AP's revenue resources. The contrary conclusion does not follow merely because AP's board of directors has chosen up to the present to allocate expense to a city and field and to divide such allocation among the members therein, irrespective of their number.

The newspapers served by AP have a voice in its management and control, but subscribers to UP and INS have no such control over their operations. This is a difference going to sub-

[28] AP's statement (Br. 45) that a new member in a city and field where there is one "adds substantially nothing to * * * the news coverage of AP" cannot be accepted. To take one example, the Chicago Sun, the country's eleventh largest newspaper, can obviously make a greater contribution of local news than can a paper with a daily circulation of less than 3,000 published in a town or city not presently represented in membership. This is not an extreme illustration since there are numerous AP members with a daily circulation of less than 3,000 (Lee affidavit, Ex. 2, R. 1088–1112).

stance; AP has averred that it is this characteristic which gives its news service peculiar value. Its answer to the complaint states (R. 117–8):

> The nature of the service furnished by AP and the resulting contribution which AP has made to the dissemination of complete and unbiased information of world events and conditions are not fortuitous, but stem from the very character of AP's organization. This in turn reflects the experience gained in a long-continued struggle by newspapers to obtain effective cooperative control over the news gathering and distributing facilities upon which they depend.[99]

The question of the legality under the Sherman Act of an agreement between UP or INS and a subscriber to its news service not to furnish news to a competitor of the subscriber is not now before this Court. We have already indicated why it is far from "inconceivable", as AP believes (Br. 67), that there should be one rule for AP and another for UP and INS. But what is important to note is that such an agreement by UP or INS would not be within the rule that refusal to deal by a single trader does not violate the Sherman Act even if the trader uses his power of customer selection to promote particular resale price or other policies. Rather, such agreement would

[99] For similar statements by the man who served as AP's president for more than 25 years, see Noyes affidavit (AP), R. 1421, 1427.

involve relinquishment of the power independently to select one's customers, for the purpose of restraining or suppressing the competition of others with the favored customer. It would be analogous to an agreement between a distributor of copyrighted films and his first licensee calling for restrictive conditions in subsequent licenses granted by the distributor to competitors of the first licensee; such as was held illegal under the Sherman Act in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227–230.

The cases involving commodity exchanges cited by AP (Br. 69–71) do not deal with or consider any question similar to that here presented; namely, whether an agreement by the members of a membership corporation to exclude competitors of the individual members from certain trade violates the Sherman Act. In *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, the Chicago Board of Trade collected quotations on sales made on the Board and delivered the quotations to telegraph companies under agreements to transmit the quotations only to persons approved by the Board. In a suit to enjoin unauthorized use of these quotations the question decided by this Court was that the alleged gambling character of the sales on the Board was not a defense to unauthorized use of the quotations. The Court said (p. 252) that the legality under the Sherman Act of the contracts with telegraph com-

panies was not before it, and its dictum that the contracts involved no monopoly or contract in restraint of trade was not directed to their exclusory aspect. As to this, the Court said that the scheme to exclude bucket shops simply restrained acquisition of the quotations "for illegal purposes".

United States v. *New York Coffee & Sugar Exchange, Inc.*, 263 U. S. 611, presented solely the question whether the evidence established the Government's charge that the officers and members of the Exchange had conspired to establish artificial prices for sugar.

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, quotations of prices established in sales on the Exchange were distributed only to persons approved by the Exchange and applicants were required to agree not to use the quotations in connection with a bucket shop. This Court held that the Exchange did not violate the Sherman Act when it refused the quotations to a concern which it had found to be organized as a cover to permit bucket shop operations. The case involved disposal of a by-product of the business carried on by Exchange members and the refusal to deal was not for the purpose of restricting competition with Exchange members.

Appalachian Coals, Inc., v. *United States*, 288 U. S. 344, did not involve, directly or indirectly, any refusal to deal or exclusion of others from

advantages of joint action. While membership in the agency organized to market bituminous coal was limited to 80% of the commercial tonnage of the producing area, less than that percentage had sought membership. And in *Greer, Mills & Co. v. Stoller*, 77 Fed. 1, (W. D. Mo.), no question of violation of the Sherman Act or of restraint of trade at common law was passed upon.

The ten cases cited by AP (Br. 73–74) as holding that cooperative associations may withhold association privileges from nonmembers have even less relevancy to the issues here than the commodity exchange cases. With two exceptions, no question of restraint of trade either at common law or under state or Federal statute was even considered in these ten cases; and the two exceptions referred to in the margin in no respect support the defendants here.[1]

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[1] *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210, 234–235 (1892), held that even if rules of the Exchange under which its members were barred from dealing with the plaintiff were in restraint of trade the plaintiff could not, by reason of their illegality, obtain the affirmative equitable relief which it was seeking. *Cline v. Insurance Exchange of Houston*, 140 Texas 175, 182–183 (1943), held that the rule of the Exchange attacked by the plaintiff did not violate the antitrust laws of the state, the court saying that no evidence of a conspiracy had been offered, that any person willing to comply with the rules of the Exchange could become a member, and that it did not appear that the rule under attack would in any way prevent or lessen competition.

II

THE AGREEMENT OF AP'S REGULAR MEMBERS TO GIVE THEIR LOCAL NEWS EXCLUSIVELY TO AP AND AP'S CONTRACT WITH THE CANADIAN PRESS CONFERRING UPON AP EXCLUSIVE RIGHTS IN THIS COUNTRY TO CANADIAN PRESS NEWS ARE IN UNLAWFUL RESTRAINT OF INTERSTATE COMMERCE IRRESPECTIVE OF ILLEGAL RESTRICTIONS ON MEMBERSHIP IN AP

A. The Members' Agreement not to Give their Local News to any Nonmember

The Government is not attacking the requirement of the AP by-laws that every member furnish his local news to AP.[1] It attacks only the requirement that no regular member shall furnish, "or permit anyone to furnish", such news to a nonmember (Art. VIII, Sec. 6, R. 80). By virtue of this requirement, the 1,235 regular AP members have entered into a multilateral agreement to interchange their local news exclusively with each other and have reciprocally agreed not to sell such news to or exchange it with any nonmember. The extent to which the agreement blankets the country is shown by the fact that it covers morning newspapers having 96% and after-

[1] The exact obligation is to furnish news of the "member's district, the area of which shall be determined by the Board of Directors," which is "spontaneous in its origin" and which has not "originated through deliberate and individual enterprise on the part of such member" (Art. VIII, Secs. 3, 4, R. 79).

noon papers having 74%, of the total circulation in these respective fields.[3]

We submit that the cases and the principles discussed in connection with the AP membership restrictions clearly establish the invalidity of this agreement. It is a combined agreement by the newspaper members—comprising a preponderant part of the entire industry—that each will not deal with any nonmember respecting the local news which it gathers. It is also an agreement by independent business enterprises to obtain an advantage in trade for themselves by a pooling of information from which others are excluded.

The agreement, like that relating to admission of new members, is aimed at and effects a restraint of competition. The agreement not to furnish reports of local news to any nonmember restricts the sources of news available to every non-AP newspaper competitive with any member. Such newspapers necessarily rely upon the news service of UP or INS for reports of spontaneous news in localities other than their own. The agreement among the regular members of AP bars UP and INS from obtaining from them the spontaneous news which they gather and shuts off UP and INS from a quick and reliable source of information as to unanticipated events of all kinds.

[3] Percentage as to morning papers computed from figures in Findings 86 and 88 and percentage as to afternoon papers computed from figures in Findings 87 and 93 (R. 2618–20).

The district court was of the opinion that the agreement for an exclusive interchange of the members' local news fell within the rule that "a restrictive covenant necessary to the protection of property transferred is 'reasonable'" (R. 2598). The court further said that taken by itself, and apart from the restrictions upon membership, the agreement—

> would be valid; it is essential to the protection of the main purpose that the member who furnished "spontaneous" news * * * shall not destroy the value of what is transferred by making it available to others, before it can be published. (*Ibid.*)

We submit that the district court's analysis of this matter was incomplete and erroneous. The common type of an "ancillary" or "partial" restraint is, as the court noted, a covenant by the seller of a business or of a professional practice not to compete with the buyer, this being upheld as in aid of the main lawful purpose of the contract if the covenant is reasonably limited in duration and territorial coverage. See *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 281–282 (C. C. A. 6), affirmed 175 U. S. 211. But in the present case the agreement is not between a single seller and buyer (treating the AP member as the seller and AP as the buyer). The agreement is a horizontal one by and between the various AP members, AP's role being merely that of agent of the members. Each member has, as to the inter-

change of news, the dual position of seller and buyer in that the member both contributes and receives news reports. Their agreement is therefore like that condemned in *Montague & Co.* v. *Lowry*, 193 U. S. 38, where a dominant group of sellers and a dominant group of buyers agreed to deal exclusively with each other.

The restraints of this agreement will not be cured by removal of illegal restrictions on AP membership. Not every newspaper free to become an AP member will wish to do so. The very enlargement of membership resulting from removal of present barriers to admission will further limit the number of newspapers from which UP and INS can obtain news reports. An agreement in restraint of trade which tends to coerce membership in AP, is as much to be condemned as one which operates to exclude from membership.

We submit that the district court erred in stating that if members were free to make their local news available to others "before it can be published", this would "destroy the value" of the local news which they furnish to AP. In the first place, the members' agreement is that they will not furnish their spontaneous news to others before, simultaneously with, or after they have reported the news to AP. This is very different from an agreement merely not to report to others in advance of reporting to AP. In the second place, elimination of the requirement that the

member report his spontaneous local news exclusively to AP would not "destroy the value" of his report to AP. That AP attaches value to a nonexclusive report of the news of the vicinage gathered by a member is established by the fact that associate members are subject to the general requirement to report such news but are exempt from the obligation to report to AP exclusively (R. 79–80). The action of the other news services establishes that they also attach value to the right to receive from newspapers nonexclusive reports of such news.[4]

Defense of the members' agreement not to furnish to any nonmember the spontaneous local news which they gather, upon the ground that this is necessary to achieve the exclusiveness which gives value to the news reported to AP, presents this dilemma. To the extent that AP and its members thereby achieve full exclusiveness as to this news, they are monopolizing as well as restraining commerce therein. The monopolization, though fleeting, is for the period of time during which it has value to newspapers and may be judicially protected against unauthorized appropriation. See *International News Service*

[4] INS always seeks to obtain from its newspaper subscribers an obligation to furnish to INS, but not exclusively, the local news which the newspaper gathers (Connolly deposition (AP), R. 2169). UP in its contracts with non-AP newspaper subscribers requires them to report to UP the news which they gather (Williams affidavit (AP), R. 1478).

v. *Associated Press*, 248 U. S. 215. On the other hand, if, as AP indicated in its brief in the district court, the agreement for exclusive report to AP has little practical importance and effect today,[8] the argument that such agreement is necessary to preserve the value of the news which the member reports to AP correspondingly disappears.

We therefore submit that the provisions of the AP by-laws which prohibit regular members from furnishing to any nonmember news which they are required to report to AP are unlawful taken by themselves and irrespective of coincident illegal restriction on membership in AP.

The judgment which the district court entered gives effect to the views set forth in the court's opinion (R. 2599), that the agreement of members not to give to any nonmember the spontaneous news which they gather is unlawful only as a part of an unlawful combination which, "though bound to admit all on equal terms, does not do so", and that the agreement as to spontaneous news was therefore to be enjoined only "until the primary wrong is remedied". Paragraph III B of the judgment declares that the by-law provision prohibiting giving such news to a non-member, "taken

[8] The AP brief (pp. 20–21) asserted that the effect of eliminating the prohibition against a member furnishing his local news to a nonmember "would be primarily psychological", adding that the "psychological factor, however, is not without significance".

in connection with" the existing restrictions on membership, is illegal and is canceled, and the paragraph enjoins adopting any new or amended by-law having a "like" purpose or effect, i. e., when connected with illegal membership restrictions (R. 2632). Paragraph V of the judgment also expressly gives the defendants leave to apply for modification or termination of paragraph III B, upon furnishing satisfactory proof that they have amended the by-law provisions respecting the admission of members in conformity with paragraph I of the judgment (R. 2633).

We submit that the judgment should be modified by eliminating the words "taken in connection with the by-laws and agreements described in Paragraph I hereof" from paragraphs III A and III B of the judgment.

B. Contract With Canadian Press Giving AP the Exclusive Right in this Country to Canadian Press News

Canadian Press is a non-profit membership corporation composed of Canadian newspapers, described by AP's general manager as "a counterpart in the Dominion of Canada of AP".[6] Its membership comprises over 95% of the total circulation of English-language Canadian newspapers and its members are not permitted to furnish reports of their local news to any United States newspaper or news agency other than AP

[6] Cooper affidavit (AP), R. 1435; McNeil affidavit (AP), Ex. 1, R. 1859-60.

and its members (*supra*, pp. 43–44). A contract running for ten years from November 1, 1935, and thereafter from year to year until terminated by six months' notice, obligates Canadian Press to deliver to AP, for its exclusive use throughout the world (aside from Canada and English Western Hemisphere possessions), the Canadian news gathered by Canadian Press. The contract also provides that AP shall give its news to Canadian Press for the exclusive use of that organization in Canada and English Western Hemisphere possessions,[7] but the Government is presently attacking only the exclusive rights given to AP (see *supra*, p. 45).

Under the foregoing contract all competition between AP and other American news agencies or newspapers to obtain the news reports of Canadian Press is eliminated for a period of at least ten years. AP is given a ten-year monopoly, not of Canadian news as such, but of the only available comprehensive and speedy report of the news of a great neighboring country, a report contributed to and supported by substantially all of the country's newspapers. Aside from the question of cost, no really comparable substitute for this report could be built up by UP or INS.

In *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 719, this Court was evenly divided as to the legality of an exclusive supply contract.

[7] Eng. 134, R. 2625–6; Ex. 1, R. 458, 460.
[8] *Idem.*, Ex. 4, R. 458–9.

But in that case the contract was terminable at will, it applied to a product which could be obtained from other manufacturers, and it protected a comparatively small concern against possible destruction of its specialty business if the supplier, the leading manufacturer in its field, were free to make the specialty product for others or to market such product itself. If the reasonableness of the restraint is the test of the validity of a contract to supply exclusively one person or corporation, we submit that the circumstances to which we have already referred clearly make the restraints and monopolization resulting from AP's exclusive rights under the Canadian Press contract unreasonable.

If the Sherman Act sanctions the Canadian Press contract, it would appear to be permissible for AP to enter into a series of exclusive news-exchange contracts with foreign news agencies. Prior to 1932, indeed, the flow of news from country to country was to a large extent governed by just such contracts. Under an agreement made in 1902 between AP, Reuters (British), Havas (French), and Continental Telegraphen Compagnie, i. e., Wolff (German), AP was exclusively entitled in the United States to the news of the three foreign agencies and AP was barred from furnishing its news to any one, other than these agencies, outside of North America, Central America and United States possessions.* This was

* Pl. 2nd Req. Adm. 5-d. Ex. 5-A (R. 335, 369-71), admitted (R. 369, 432).

followed in 1927 by an agreement, called a "Treaty", between the four agencies which begins with the recital that they "have regulated between themselves the exploitation of the world's news" by an agreement expiring December 31, 1927.[10] The 1927 agreement provided that AP "shall have the exclusive news distribution field of" North America and United States possessions, reserving, however, to Reuters and Havas a "free hand" in Canada and Mexico and to AP a "free hand" in Central America, South America and Cuba (R. 374).[11] A 1932 "Treaty" between the parties continued the intra-party news exchange and division of territory but permitted the giving of news to a newspaper, but not to any outside news agency, in the territory of another party.[12]

We may turn to AP itself for an apt characterization of these cartel agreements. In 1934 AP

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[10] *Idem*, 5-b, Ex. 5-B (R. 355, 373), admitted (R. 399, 432).

It appears that the 1902 agreement remained in effect until December 31, 1927. It was described as of that time by AP's general manager as "the 34-year-old contract". Cooper, *Barriers Down* (1942), 174. The 34 years to which he refers run from 1893 when, upon organization of AP's predecessor, Reuters, Havas and Wolff "gave the United States and Canada to The Associated Press" (*idem*, 169).

[11] A supplement to the 1927 agreement between AP and Reuters gave AP "free entry into Japan to serve only Reuters' ally in Japan", and with the ally's consent, its members and clients (Pl. 2nd Req. Adm. 5c, Ex. 5-C (R. 355, 380), admitted (R. 399, 432)).

[12] *Idem*, 5-d, Ex. 5-D (R. 355, 382-3), admitted (R. 399, 432).

and UP made a five-year contract providing that neither would contract for the news of any "European agency" unless such agency's news should be available to the other "upon the same terms", the contract reciting that AP and UP do not approve "the practice of European agencies which at the dictation of one or more of them hinder international news exchange by making exclusive arrangements for the availability of their news." AP's general manager described this contract with UP as "a thrust at the Victorian news agency monopoly".[14] The thrust, however, was so phrased as not to include the AP-Canadian contract for exclusive news exchange, and the thrust was quietly ended by the same general manager of AP, for reasons not stated, by giving UP on October 5, 1936, advance notice of termination of AP's contract with UP.[15]

The district court in its opinion and judgment treated the contract provisions by which AP secured exclusively for its own members all Canadian Press news dispatches as governed by the court's ruling on the members' agreement not to furnish their spontaneous news to nonmembers (R. 2599, 2632–3). Reading paragraph IV B of the judgment together with paragraphs IV A and V, the injunction against such exclusive provisions

[13] *Idem*, 6–a, Ex. 6–A (R. 355, 387–9) admitted (R. 399, 433).

[14] Cooper, *Barriers Down* (1942), 251.

[15] Pl. 2nd. Req. Adm. 6–b, Ex. 6–B (R. 355–6, 392), admitted (R. 399, 433).

of the Canadian Press contract will not bar their reinstatement following amendment of the AP by-laws which eliminates illegal restrictions on membership in AP. We therefore submit that the district court's judgment should be modified by striking from paragraphs IV A and IV B the words "taken in connection with the by-laws and agreements described in Paragraph I hereof".

III

THE PROVISIONS OF THE JUDGMENT RELATING TO ADOPTION BY AP OF NEW BY-LAWS RESPECTING ADMISSION TO MEMBERSHIP FAIL TO GIVE ADEQUATE RELIEF AND SHOULD BE MODIFIED

The question of what provisions restricting the admission of new members may be incorporated in new by-laws to take the place of those voided by the judgment is of fundamental importance. The Government does not object to what it believes to be the basic theory upon which the district court's judgment was formulated, i. e., that the conditions for admission shall be the same when the applicant's newspaper is published, and when it is not published, in the same "field" and city as that of a member newspaper. But the Government contends that the judgment does not adequately assure attainment of this end.

In the hearing before the district court on the motion for summary judgment neither the Government nor the defendants discussed in their briefs or in oral argument the nature of the relief

which should be granted if the court sustained the Government's attack on the validity of the existing rules governing admission to membership. The Government assumed, as the defendants probably also assumed, that if the court sustained the Government's attack, it would leave open the question of relief until the parties should have submitted their respective proposals and a hearing thereon had been held. While the parties did submit to the court proposed judgments and argument thereon was heard, the court had so explicitly stated in its opinion the relief which it would grant (R. 2598, 2600) that the proposed judgments and hearing involved little more than giving formal effect to the court's prior declaration as to the relief to which the plaintiff was entitled.

The provisions of the judgment bearing upon adoption by AP of new by-laws to take the place of those adjudged illegal might be drafted on either of two bases. One would be to phrase the prohibition in general terms, as is customary in judgments entered in cases under the Sherman Act. The other would be to chart in the judgment as definitely as is reasonably practicable the requirements to which new by-laws must conform. The district court adopted the latter basis for formulating the judgment. If this Court should decide that relief respecting new by-laws restricting admission to membership should be phrased

only in general terms, this end could be achieved by a very simple change in the judgment, namely, elimination of the two provisos of paragraph I B of the judgment. That paragraph, after declaring illegal and canceling the existing by-law provisions dealing with admission of new members, enjoins the defendants from promulgating and observing any new by-laws "having a like purpose or effect in respect of admission to The Associated Press" (R. 2630-1). The Government believes, however, that relief in such general terms has certain disadvantages in the present case. Decision as to the character of the substitute by-laws permissible under the judgment would, in effect, be postponed. In addition, the practical problems incident to making vital changes in by-laws of an organization with a large and scattered membership point to the desirability of advance specification of the required changes.

This advance specification is given by the second proviso to paragraph I B of the judgment. The first proviso to the paragraph is merely introductory and states that nothing contained therein shall prevent AP from adopting new by-laws "which will restrict admission". The second proviso qualifies this permission as follows:

> provided that members in the same city and in the same "field" (morning, evening or Sunday), as an applicant publishing a newspaper in the United States of America

> or its territories, shall not have power to impose, or dispense with, any conditions upon his admission and that the by-laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and "field" shall not be taken into consideration, in passing upon his application. (R. 2631.)

From the language of the judgment itself, it would appear that its requirements would be met simply by incorporating in the new by-laws the two limitations set forth in the above proviso, and the district court's opinion supports this view. The court said (R. 2598): "We shall not attempt to say what conditions [restricting admission] may be imposed; we hold no more than that * * *", and the court then outlined the limitations substantially as they were later incorporated in the second proviso to I B of the judgment.

The limitation that "members" in the same city and field as the applicant shall not have "power to impose, or dispense with, any conditions upon his admission" would not by its express terms bar the adoption of by-laws providing one basis for admission where there is a member in the city and field of the applicant and a totally different, more onerous basis for admission where there is no such member. Under such by-laws the competitive members would have no

power to impose or dispense with conditions on admission but the by-laws themselves would make the stated conditions govern *all* applications involving competition with a member.

The Government recognizes that to subject applicants who are competitive with a member to special requirements of an extreme type would undoubtedly be held to be forbidden whether or not this came within the express language of the limitations of the proviso. But there is real danger that any special procedure or conditions, not on their face unduly restrictive, governing admission of applicants competitive with a member would be utilized to bar such applicants for competitive reasons.

We submit that if the judgment is to give adequate assurance of effective relief, the first limitation of the second proviso must be more explicit and comprehensive. The following is suggested by way of a substitute:

> the procedure and the conditions for admission to membership of an applicant seeking membership in a city and "field" (morning, evening or Sunday) in which there are one or more existing memberships shall be the same as the procedure and conditions for admission to membership of an applicant seeking membership in a city and field in which there is no existing membership; and that no applicant shall be required as a condition to admission to

> make any money payment or give any other consideration, directly or indirectly, to any AP member or members;

That part of the proposed substitute which bars requiring an applicant to make a money payment to individual AP members, as distinguished from a payment to and for AP itself on account of the new member's proportionate share of AP's net assets, makes explicit what we believe to be otherwise implicit in the judgment. It will serve, however, to avoid ambiguity and possible fruitless controversy. Obviously no new member should be required to compensate members competitive with him for their loss of "rights" of an illegal exclusory and monopolistic character.

The second limitation of the second proviso in paragraph I B is that the by-laws "affirmatively declare" that the effect of admission upon the applicant's ability to compete with members in the same city and field "shall not be taken into consideration in passing upon his application". The Government regards this limitation as being, in itself, desirable and appropriate. But, when written into the by-laws, it is not self executing; it remains hortatory. The district court frankly recognized this. It said in its opinion (R. 2598):

> It is of course true that the members may disregard the last provision in practice; but that is not to be assumed. At any rate, * * * it is as far as we can go.

When an organization has been operating for 44 years on a basis directly opposed to that provided for by the judgment and when change is so strenuously resisted (as the present litigation attests), the ultimate effectiveness of the judgment should not be left to depend upon a gamble on the members' willingness to conform their conduct to the spirit and intent of the court's judgment. Some safeguarding provisions are, we submit, plainly called for. What these should be will largely depend upon the nature of the requirements for admission under AP's new by-laws. The Government therefore believes that the language of the judgment must be general on this point and we suggest adding to paragraph I B the following:

> and that the by-laws shall contain such further provisions as may be reasonably necessary or appropriate to assure observance of this declaration.

If both this change and the change previously suggested (*supra*, p. 119) are made, the judgment will specify the substantive requirements as to new by-laws, leaving open only the comparatively minor matter of supplementary provisions designed to secure compliance with the substantive requirements. The district court's ruling on supplementary provisions can be obtained prior to submitting the new by-laws to the members for vote. We have set forth in the Appendix, *infra*, p. 137, the two provisos of paragraph I B of the judg-

ment as they will read if the changes requested by the Government are adopted.

The question of additional relief here presented is very different from that which was in issue in *United States* v. *Bausch & Lomb Optical Co.*, 313 U. S. 707. In that case this Court, in denying the Government's plea for inclusion in the judgment of a further requirement to prevent continuance of the unlawful Soft-Lite distribution system, said (page 729):

> We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree.

The present question concerns a command of the judgment as to which compliance or noncompliance will be peculiarly difficult to determine if the judgment provides no further means for testing the question. Furthermore, it is in the interest of AP itself that the full extent of its obligations under the judgment should be promptly settled.

IV

THE DECREE WILL NOT CONVERT AP INTO A PUBLIC UTILITY, NOR DOES IT EXCEED THE APPROPRIATE LIMITS OF EQUITABLE RELIEF

Appellants contend that the decree assumes that AP is a "business affected with a public interest" and that in effect it transforms AP into

a public utility. This line of argument was aptly termed by Judge Learned Hand to be "a red herring which should no longer be allowed to break the scent" (R. 2597). It cannot be successfully urged that AP, as a great news-gathering and distributing enterprise engaged in interstate commerce, is not subject to the Sherman Act. See *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 133.

The decree against AP is no different in character from those which have been traditionally entered against other violators of the antitrust laws. In cases of illegal boycotting an injunction, negatively phrased, against the continuance of concerted refusals to deal, is tantamount to a direction that the defendants shall deal without regard to the factors which led to the boycott.[16] In a number of cases the decrees have been affirmative in form, requiring the defendants to deal on equal terms with those who had previously been

[16] Illustrative of such a negative injunction is the decree in *United States* v. *National Association of Retail Druggists* (N. D. Ind.), found in *Decrees and Judgments in Federal Anti-trust Cases*, 115, 123–124. Certain defendants were enjoined "from refusing to sell or from discriminating in their sales to persons, corporations, or partnerships, whose names appear or have appeared on any list or document published or issued by or with the assistance of or under the direction of the defendants, * * * purporting to contain the names of persons, corporations, or partnerships, adhering or not adhering to their contracts, or maintaining or refusing to maintain prices for the reason, in whole or in part, that said names appear or have appeared on such lists; * * *"

excluded. Thus in *United States* v. *Terminal R. R. Assn.*, 224 U. S. 383, a terminal association which was monopolizing the means of access to the City of St. Louis was required, on pain of dissolution, to submit a plan for the admission of other railroads to joint ownership and control on reasonable terms, "which shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies" (p. 411) and for the use of the association's facilities on similar terms by railroads not electing to become owners. In *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 747 (N. D. Ohio), the defendant was offered a similar alternative to dissolution; namely, the presentation of a—

> plan whereby its service shall be given for the equal benefit of all requiring the same * * * so that the company becomes in truth "the bona fide agent and servant" of every vessel owner who shall use or need its facilities, and so that the rights of competitors are completely safeguarded * * *.

Thereafter, the court devised a scheme which it thought met the indicated test (*United States* v. *Great Lakes Towing Co.*, 217 Fed. 656) and the government dismissed its appeal to the Supreme Court (245 U. S. 675).

In *United States* v. *New England Fish Exchange*, 258 Fed. 732, 752 (D. Mass.), defendants

were required to submit regulations, upon pain of dissolution, opening up a fish pier to outside dealers. More recently, a three-judge court, in *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.) required the Pullman Company, contrary to its previous practices, to operate sleeping cars manufactured by anyone and tendered to it, and to furnish through-line service to any railroad or group of railroads unconditionally (p. 137).

These cases do not rest in any respect upon a consideration of the question whether the enterprise involved in the particular case was or was not a public utility. The basis of the relief granted was the mandate of the antitrust laws, and not any duty at common law or otherwise to serve the public generally. This is made quite clear by comparing the decision in the *Terminal* case, *supra*, with that in *Louisville & Nashville R. R.* v. *United States*, 242 U. S. 60, which arose under the Interstate Commerce Act and not under the antitrust laws. In this case, it was held that carriers which had a joint lease of terminal properties and operated them through a joint agent were not obliged to receive traffic from an outside line; refusal to switch such traffic was held not to constitute unlawful discrimination. This result was held to follow from the terms of the Interstate Commerce Act, which, in Section 3, after requiring carriers to afford equal facilities

for the interchange of traffic, provided that this requirement was not to be construed "as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." Not until the amendments of 1920 was this proviso eliminated. See Sharfman, *The Interstate Commerce Commission*, III–A, pp. 410–421.

Petitioners also contend that the decree exceeds the bounds of appropriate equitable relief because it requires AP and its members to exclude from consideration the factor of the competitive position of an applicant for membership. But the relief presents no more difficult problems of judicial administration in this regard than are commonly found in decrees of courts of equity. A similar contention was urged in *Virginian Ry. Company* v. *System Federation No. 40*, 300 U. S. 515, 549–553. There it was contended that an obligation to negotiate in good faith should not be made the subject of a mandatory injunction, since "negotiation depends on desires and mental attitudes which are beyond judicial control." (P. 549.) This Court, rejecting the argument, observed that "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." (P. 550.) The Court added that it could not ignore the judgment of Congress that negotiation is

a powerful aid to industrial peace, nor could it ignore the large public interests affected, and it was pointed out that courts of equity frequently go much further either to give or to withhold relief in furtherance of the public interest than where only private interests are involved.

Similar contentions were made in attacking the validity of the National Labor Relations Act on the ground that it in effect compelled employers to enter into employment relationships or else placed on the board and the courts the impractical task of deciding whether the employers' actions with respect to hiring and discharge were determined by antiunion discrimination or by legitimate considerations. Cf. *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1, 45–46. Here, as there, past conduct is relevant in interpreting future compliance. Where an applicant was previously rejected following the exercise of a protest right, his subsequent rejection would, it is submitted, constitute *prima facie* evidence of violation of the decree.

It is contended further that the courts are ill equipped to supervise a decree in this case, and the dissenting opinion of Mr. Justice Brandeis in *International News Service* v. *Associated Press*, 248 U. S. 215, is invoked. The reference to that opinion is somewhat ironic, for its import was that the courts should not declare the existence of a property right in news, to be protected by in-

junctive relief against misappropriation by others, inasmuch as the granting of such protection ought appropriately to be accompanied by the imposition of obligations on the part of the news association which would best be the subject of legislative action. The opinion is far from standing for the proposition that the courts should abdicate their function in enforcing the antitrust laws under which Congress itself has imposed obligations upon all forms of interstate commercial enterprise. Furthermore, the apprehension that difficult questions of supervision of the affairs of AP will be required is unfounded. The hypothetical instances suggested (AP Br. 87–89) are without reality, since nothing in the decree will require AP to alter its classification or treatment of members once they are admitted, nor indeed will it affect standards of admission other than those based on the competitive position of an applicant.

We have previously suggested (pp. 119–121, *supra*) elaboration of the terms of the decree to the end that its object may be even more clearly and effectively achieved.

The judgment does not, directly or indirectly, touch upon the quantity or quality of service to be furnished by AP to its various members or the rates to be paid for such service. The Government flatly denies AP's statement (Br. 89) that "the court would have to exercise continuing

supervision over the relationship between the members even after they have been admitted." The one and only change in the by-laws required by the judgment, apart from making the requirement to report local news non-exclusive, is elimination of the right to exclude from membership for competitive reasons. With this change made, the judgment leaves AP free to operate precisely as it has operated in the past.

Appellants Tribune Company and McCormick object to the judgment (Br. 43–48) upon the curious ground that it requires AP to take affirmative action to end the restraints which the court found to be illegal. What these appellants seem to urge is that the court should have given to AP the option whether or not it would terminate these restraints. For example, they complain (Br. 46) that the judgment would not permit AP to continue to function "with its present memberships frozen in fields where members now exist", i. e., with those who are now barred from AP news for competitive reasons left forever barred.

These appellants betray their complete misunderstanding of the court's decision and judgment by their discussion of the court's cancellation of the first sentence of Article III, Section 3, of the by-laws. This sentence permits the board of directors to elect to membership where there is no member in the city and field of the applicant. Tribune Company and McCormick, pointing out

that the opinion below does not condemn election of such applicants by such method, profess (Br. 45) their inability to understand the reason for cancellation of this part of the by-laws. But if the judgment had, on the one hand, allowed this provision to stand and had, on the other hand, cancelled all provisions for admission where there is a member in the city and field of the applicant, the by-laws as thus partially truncated would impose restraints even more patently illegal than those imposed by the by-laws prior to entry of judgment. There would be the same barring from AP news for competitive reasons but this barrier against competitors, instead of being merely substantially absolute, would be quite absolute.

V

THERE IS NO VIOLATION OF FREEDOM OF THE PRESS

The contention of appellants that the decree is in conflict with the guarantee of the freedom of the press under the First Amendment is without substance. It is an echo of the argument made in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103. There it was vigorously contended that freedom of the press was abridged by the requirement that an editorial employee be reinstated after he had been discharged for reasons which the board found were grounded in his union activities. That case, it was argued, was concerned not with mechanical employees but with

those who helped to edit and write news reports, and hence it was maintained that freedom of supervision and discharge without restraint by the surveillance of governmental agencies was essential to freedom of the press. "Can the newspaper be free if it is not able to choose between authors?" (p. 733). This Court, rejecting the argument, said (pp. 132–133):

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws.

The Court observed that the Associated Press retained full freedom to enforce policies of its own with respect to employment, editorial policies, and writing news, save that it might not discriminate against employees because of their labor activities.

In the present case there is even less semblance of interference with freedom of the press than it was argued existed in the earlier case. The antitrust laws do not affect in any way the editorial policies of the press. These laws deal with the relations of AP and its members to other

newspaper enterprises, and their effect is to widen the field of dissemination of news.

Appellants have quoted at length from the constitutional history of the First Amendment. But to ask that it be applied to strike down a nondiscriminatory regulation of commerce whose objective is the removal of restraints on the distribution of news is, to adapt the words of this Court in *O'Malley* v. *Woodrough*, 307 U. S. 277, 282, to belittle the great historic experience on which the framers based the safeguards of the First Amendment. For the same reason the references to control of the press in totalitarian countries (cf. AP Br., p. 103, note), which are again reminiscent of the argument in *Associated Press* v. *National Labor Relations Board, supra*,[17] are beside the point.

So far as appellants' objection under the First Amendment is specific, it appears to be that the decree takes from the press the right to their own "copy" and violates the "fundamental right defined by Milton" as "the just retaining of each

[17] Cf. the argument in the *N. L. R. B.* case, 301 U. S. at 733: "* * * Suppose one of our dictatorial neighbors in Europe should say * * * to the newspaper publisher, 'You shall not dismiss this man because he is a member of the Nazi or the Fascist or the Communist Party; you cannot dismiss him for that reason,' is it conceivable that that would leave the press free? * * * Indeed, what more effective engine could dictatorial power employ than to name the man who shall furnish the food of facts on which the public must feed?"

man his several copy; which God forbid should be gainsaid." (AP Br. 101). To this objection the answer is twofold. In the first place, the property right in one's own copy, important as it may be, is hardly an element of the guarantee of freedom of the press, and it was not so conceived by Milton himself, who spoke of it as a "pretense" by which "some old patentees and monopolizers in the trade of bookselling" supported an order requiring the registration of the printer's name in all books published.[18]

[18] The passage, which occurs in the final paragraph of Milton's *Areopagitica*, reads as follows:

"And as for regulating the press, let no man think to have the honour of advising ye better than yourselves have done in that order published next before this, 'That no book be printed, unless the printer's and the author's name, or at least the printer's, be registered.' * * * Whereby ye may guess what kind of state prudence, what love of the people, what care of religion or good manners there was at the contriving, although with singular hypocrisy it pretended to bind books to their good behaviour. And how it got the upper hand of your precedent order so well constituted before, if we may believe those men whose profession gives them cause to inquire most, it may be doubted there was in it the fraud of some old patentees and monopolizers in the trade of bookselling; who under pretence of the poor in their company not to be defrauded, and the just retaining of each man his several copy, (which God forbid should be gainsaid,) brought divers glossing colours to the house, which were indeed but colours, and serving to no end except it be to exercise a superiority over their neighbours; men who do not therefore labour in an honest profession, to which learning is indebted, that they should be made other men's vassals. * * *"

Secondly, nothing in the decree as entered or as sought to be modified by the Government deprives publishers of the right to retain their own copy. AP news is not required to be distributed to nonmembers; what is required is that there be an end of concerted withholding of news from competitive papers which may in all other respects satisfy the conditions of admission to membership. With respect to news of local origin having its source with an individual member paper, the Government does not seek to require the indiscriminate distribution of such news; it seeks only to have the member papers free themselves from the agreement whereby they have precluded individual freedom of contract with respect to the distribution of such news.

So far as the concept of the freedom of the press is at all relevant here, it may fairly be said that the relief granted and sought is in the interest of greater, and not less, freedom. The great objectives of the constitutional provision—to "preserve an untrammeled press as a vital source of public information" (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250)—will, we submit, be furthered and not abridged by removing barriers erected by private combination against access to reports of world news. So the court below concluded.

CONCLUSION

For the reasons stated, the decision below should be affirmed as modified in accordance with the views advanced in points II and III of the Argument.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX

Table A

Paper	1st year rejected	Year admitted	Time lag (years)	Record Reference
New York (N. Y.) Evening Journal	1900	1941	41	689
Chicago (Ill.) American	1900	1933	33	689
Red Wing (Minn.) Republican	1905	1940	35	692
Portland (Oreg.) Journal	1906	1931	25	693
Pasadena (Calif.) Evening Star News	1919	1932	13	700
New York (N. Y.) Evening Sun	1920	1923	3	701
New York (N. Y.) Daily and Sunday News	1926	1927	2	706
7 papers			152	

Table B

Paper	1st year rejected	Year admitted	Time lag (years)	Record Reference
Fort Collins (Colo.) Courier	1902	1923	21	690
Springfield (Ill.) News	1904	1918	14	691
Appleton (Wis.) Post	1904	1921	17	691
Flint (Mich.) Journal	1904	1904	0	692
Fremont (Nebr.) Tribune	1904	1912	8	691
Nebraska City (Nebr.) News	1904	1925	21	691
Fond du Lac (Wis.) Reporter	1905	1926	21	692
Wallace (Idaho) Press	1906	1906	0	694
Frankfort (Ky.) Evening News	1909	1911	2	694
Alton (Ill.) Telegraph	1910	1919	9	694
Alton (Ill.) Times	1910	1916	6	695
Springfield (Ill.) Record	1911	1918	7	695
Everett (Wash.) Morning Tribune	1912	1914	2	695
St. Cloud (Minn.) Times	1914	1914	0	696
Austin (Tex.) Morning American	1914	1917	3	697
Battle Creek (Mich.) Evening News	1915	1917	2	697
Richmond (Ind.) Item	1915	1916	1	697
Joliet (Ill.) Herald News	1917	1917	0	698
Long Beach (Calif.) Evening Press	1919	1924	5	699
Maryville (Mo.) Evening Democrat Forum	1919	1930	11	700
Vallejo (Calif.) Times	1922	1943	21	704
Norristown (Pa.) Daily Herald	1922	1943	21	704
Long Beach (Calif.) Daily Telegram	1923	1923	0	704
Baltimore (Md.) Evening Sun	1924	1928	4	705
Rochester (N. Y.) Times-Union	1924	1928	4	706
25 papers			200	

PROVISOS OF PARAGRAPH I B OF JUDGMENT IF CHANGES REQUESTED IN POINT III OF ARGUMENT ARE ADOPTED

provided, however, that nothing herein shall prevent the adoption by The Associated Press of new or amended by-laws which will restrict admission, provided that the procedure and the conditions for admission to membreship of an applicant seeking membership in a city and "field" (morning, evening or Sunday) in which there are one or more existing memberships shall be the same as the procedure and conditions for admission to membership of an applicant seeking membership in a city and field in which there is no existing membership; and that no applicant shall be required as a condition to admission to make any money payment or give any other consideration, directly or indirectly, to any AP member or members; and that the by-laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and "field" shall not be taken into consideration in passing upon his application; and that the by-laws shall contain such further provisions as may be reasonably necessary or appropriate to assure observance of this declaration.

U. S. GOVERNMENT PRINTING OFFICE: 1944